85-287

No. _____

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

COURT HOUSE PLAZA COMPANY,
Petitioner,

v.

CITY OF PALO ALTO, ET AL.,
Respondents

On Petition From The Court of Appeal
Of The State of California, Sixth Appellate District

PETITION FOR WRIT OF CERTIORARI

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August 18, 1985

QUESTIONS PRESENTED

1. Should this Court now resolve the division among the state courts and federal courts as to whether the fifth amendment to the United States Constitution requires a monetary remedy for inverse condemnation through excessive land-use regulation?

2. Whether the holding of the California Supreme Court, in *Agins v. City of Tiburon*, 24 Cal.3d 266 (1979), *affd., on other grounds*, 447 U.S. 255 (1980), which denied the remedy of damages for inverse condemnation, is still viable in light of subsequent rulings by this Court.

3. Whether the definition of "vested right" used by the California courts in this case satisfies the substantive due process requirements of the fifth and fourteenth amendments to the United States Constitution.

PARTIES: INDIVIDUAL RESPONDENTS

The individual parties not named as Defendants and Respondents in the caption of this Petition for Writ of Certiorari are STANLEY R. NORTON, BYRON D. SHER, FRED S. EYERLY, ROY L. CLAY, KIRKE W. COMSTOCK, SCOTT T. CAREY, JOHN J. BERWALD, ANNE R. WITHERSPOON, JOHN V. BEARS, Councilmen PETER R. CARPENTER, MARY GORDON, WILLIAM E. GREEN, JAY W. MITCHELL, EMILY M. RENZEL, ANNE STEINBERG, Planning Commissioners, STAN J. NOWICKI, Chief Building Inspector, JAMES O. GLANVILLE, Zoning Administrator, NAPTHALI H. KNOX, Director of Planning and Community Environment, ROBERT K. BOOTH, JR., City Attorney and LOUIS B. GREEN, Assistant City Attorney.

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JURISDICTIONAL GROUNDS

The original complaint for damages in this action was filed on September 22, 1977 in the Superior Court of the State of California. A first amended complaint (Appendix A1) was filed on February 22, 1982. Defendants' demurrer and/or motion to strike petitioner's first amended complaint was granted on June 17, 1982 (Appendix A3).

Petitioner's notice of appeal to the California Court of Appeal was timely filed on August 16, 1982. The opinion of the California Court of Appeal, Sixth District (Appendix B1) was issued on May 3, 1985. Petitioner timely filed a Petition for Rehearing. The denial of the Petition for Rehearing (Appendix B2) by the California Court of Appeal, Sixth District, was filed on May 22, 1985.

A Petition for Review was filed with the California Supreme Court on June 12, 1985. The denial of the Petition for Review by the California Supreme Court was filed on July 31, 1985 (Appendix C1).

This Court has jurisdiction of this Petition under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Amendment V (Appendix E1).
2. United States Constitution, Amendment XIV, Sections 1 and 5 (Appendix E2).

STATEMENT OF THE CASE

A. *History of the City's Regulatory Action.*

Petitioner Court House Plaza Company ("CHP") is a limited partnership and the successor to an earlier partnership that owned and undertook to develop the property at issue.

On December 28, 1964, the City of Palo Alto adopted a planned development zoning ordinance, Ordinance No. 2224 (the "P-C Ordinance") (Appendix E3) which allowed the construction of professional and commercial office space on CHP's Palo Alto property. The P-C Ordinance approved by incorporation CHP's complete plans for construction of a ten-story office building on the site. CHP's plans included detailed drawings illustrating the location, elevation, and floor plan of a proposed ten-story office building, an associated multi-story parking garage, and other site accoutrements such as landscaping.

The P-C Ordinance included a proposed development schedule. Under the development schedule, CHP was required to start construction of Phase One, consisting of the first four stories of the office building and certain levels of a parking garage, within two years of the City's approval of the P-C Ordinance. By October, 1976, CHP was to commence construction of the remaining six stories of the office building (Phase Two) as well as additional parking garage levels.

The development schedule was devised in order that CHP and the City could coordinate the completion of CHP's ten-story office building with the growth in demand for commercial office space that the City expected. Originally, economic feasibility was to dictate when ultimate completion would occur.

CHP began and timely completed the first four floors of its ten-story office building by August of 1967. In constructing that Phase One, CHP actually began physical construction of Phase Two.

The foundation and structural steel for the first four floors had to be constructed at great additional expense to carry the weight of the planned six additional floors for Phase Two. In addition, two extra elevator shafts and an interior smoke-proof tower were provided in the first four stories, even though they were only required for the additional six stories of Phase Two. Other systems such as the water, sewer, and electrical were all designed to accommodate both the first four stories of Phase One and the remaining six stories of Phase Two. In addition, the heating and ventilating system and the elevator machinery for the first four floors were placed in basement mechanical rooms at great added cost instead of on the roof. This was done so that the six stories could be added without interrupting services to the earlier-built four stories. CHP spent about $500,000 in 1967 on those improvements to accommodate Phase Two.

Upon leasing the first four stories, CHP ordered and had fabricated at a cost of approximately $450,000 two additional elevators and the structural steel needed to complete the six stories of Phase Two. In March of 1970, during fabrication of the elevators and steel, use and building permits for the additional six stories of Phase Two were issued. Erection of the structural steel and installation of the elevators for the additional six stories, however, did not take place because of inability to obtain construction financing at that time after issuance of the permits.

In 1973 a 50-foot height limitation was enacted for all buildings in Palo Alto except those in planned community (P-C) districts. Hence, in theory, CHP's property was exempt.

Well before expiration of the development schedule on October 31, 1976, CHP renewed its efforts to complete Phase Two. However, due to inaction and dilatory tactics by the City, CHP was unable to obtain use and building permits for the six additional stories; even though like building and use permits had earlier been granted.

Because of this inaction and numerous delays and obstructive acts by the City and its officials, CHP was forced to apply for a one-year extension of the development schedule in August of 1976, three months before the schedule would expire. At all relevant times section 18.68.080D (Appendix E4) of Palo Alto's Municipal Code provided that the Planning Commission could recommend extension of P-C development schedule for "good cause shown by the property owner in writing". CHP believed it had such good cause. In practice, the City had routinely granted all such requests for extension of P-C development schedules. In fact, based upon a letter written on May 23, 1968 by the City Attorney (Appendix F2), CHP reasonably expected that it could also obtain such an extension upon a showing of good cause. However, the Planning Commission refused to recommend an extension after being advised by Assistant City Attorney that changed circumstances such as the controversial 50-foot height ordinance could be considered in determining whether there was good cause.

On appeal the City Council denied CHP any extension. CHP felt it possessed good cause for an extension of the development schedule based not only upon economic circumstances that surrounded completion of Phase Two, but also upon the dilatory and obstructive acts of City officials.

In order to redress the failure of the City to reissue use and building permits for Phase Two and the failure to extend the development schedule, CHP filed a mandamus action (*CHP I*) in a California trial court that eventually resulted in an appellate decision in *Court House Plaza Company v. City of Palo Alto*, 117, Cal.App.3d 871, 173 Cal.Rptr. 161 (1981), *cert. denied*, 454 U.S. 1074 (1981). That case held that the City's denial of an extension of the development schedule and its failure to issue use and building permits for the additional six stories was neither unreasonable, arbitrary nor discriminatory. Thus the Court of Appeal upheld the City's decision.

Shortly after filing the mandamus action (*CHP I*) in February of 1977, CHP filed an independent action (*CHP II*) in the same trial court to preserve its rights to damages. Respondents were given an open-ended extension of time to answer the *CHP II* complaint, pending the outcome of the *CHP I* mandamus appeal.

After *CHP I* became final, Respondents finally responded to the *CHP II* complaint by demurring to it. The demurrer was granted with leave to amend.

CHP then filed its first amended complaint (Appendix A1) alleging inverse condemnation, violation of civil rights, and conspiracy and seeking damages. All federal causes of actions were reserved for hearing in a parallel United States federal district court action between these parties, U.S. District Court (N. Cal.) No. 81-404, 454 U.S. 1074 *cert. denied*, November 30, 1981 ("*CHP III*").

Respondents' second demurrer (Appendix A2) to the amended complaint was sustained without leave to amend. In its decision (Appendix A3) the trial court held that CHP was not entitled to compensable damages under the theory of inverse condemnation alleged in its second cause of action and the *CHP II* suit was barred by *res judicata*.

This was the determination from which CHP appealed. The California Court of Appeal for the Sixth District in its opinion (Appendix B1) affirmed the decision of the trial court and concluded under *Agins v. City of Tiburon*, 24 Cal.3d 266, 272-277 (1979). *affd. on other grounds*, 447 U.S. 255 (1980), that:

1. When excessive zoning regulation has deprived a landowner of substantially all reasonable use of his property, the landowner's remedy is not damages for inverse condemnation, but either an action in mandate or for declaratory relief. Appendix B1, p. B-4.

2. The prior mandamus action (*CHP I*) determined implicitly that the City had taken no vested property right from CHP to construct Phase Two of the office building on its property. *CHP I* is *res judicata*, even though CHP had originally sought a different form of relief there. Appendix B1, p. B-8.

A Petition for Review was filed with the California Supreme Court on June 12, 1985. The denial of the Petition for Review by the California Supreme Court was filed on July 31, 1985. (Appendix C1).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. THE CALIFORNIA COURT OF APPEAL, RELYING UPON *AGINS V. CITY OF TIBURON*, 24 CAL.3D 266 (1979), *AFFD.* 447 U.S. 255 (1980) HAS RULED THAT DAMAGES ARE NOT AVAILABLE AS A REMEDY IN AN INVERSE CONDEMNATION SUIT UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, IN DIRECT CONFLICT WITH THE DISSENTING OPINION IN *SAN DIEGO GAS & ELECTRIC CO. V. CITY OF SAN DIEGO*, 450 U.S. 621 (1980), DECISIONS OF OTHER STATE COURTS OF THE LAST RESORT, AND THE DECISIONS OF THE NINTH AND FIFTH CIRCUITS OF THE UNITED STATES COURT OF APPEALS.

1. *Agins Incorrectly Eliminated All Actions for Inverse Condemnation Challenging Local Land-Use Decisions in California.*

In *Agins v. City of Tiburon*, 24 Cal.3d 266, 598 P.2d 25, 157 Cal.Rptr. 372 (1979), *affd. on other grounds*, 447 U.S. 255 (1980) ("Agins"), the California court eliminated all actions for inverse condemnation challenging local land-use decisions.

Instead, the *Agins* court found actions for mandamus and/or declaratory relief to be constitutionally sufficient remedies for the aggrieved landowner. The complaint was dismissed for failure to state facts sufficient to constitute a cause of action.

While that narrow holding of dismissal was affirmed by this Court, this Court did not reach the question of remedy under the fifth amendment. "Because no taking has occurred, we need not consider whether a state may limit the remedies available to a person whose land has been taken without just compensation." 447 U.S. at 260.

Since *Agins* this Court has hesitated to address that question in a series of cases held not ripe for adjudication on their constitutional merits. *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981) ("San Diego G. & E.") (lack of final judgment below); *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, ___ U.S. ___, *105 S.Ct. 3108 (1985)* ("*Hamilton Bank*") (failure to exhaust available state remedies).

2. *The Prohibition on Inverse Condemnation Damages is Contrary to Federal Law.*

Admittedly, this Court has not squarely decided whether a state court must entertain claims for monetary compensation, as opposed to declaratory and injunctive relief, in cases under the fifth amendment. However, this case presents that question squarely to this Court because Petitioner has received a final judgment and has unquestionably exhausted every administrative and judicial remedy now available in California.

In *San Diego G. & E., supra*, the four-justice plurality chose to leave the issue of monetary compensation undecided strictly for jurisdictional reasons (lack of final judgment below) under the peculiar procedural circumstances of that case. The four dissenters, who would have reached the merits of the case, concluded that the fifth amendment requires monetary remedies for *de facto* takings by police power regulation. Justice

Brennan, who authored the dissenting opinion in *San Diego G. & E.*, specifically so stated. Indeed, he went on to outline a measure of interim monetary damages to be applied in connection with invalidation of the offending regulation.

Justice Rehnquist, concurring with the plurality opinion, wrote separately and emphasized that he "would have little difficulty in agreeing with much of what is aid in the dissenting opinion . . . ," but that he disagreed with its conclusion that the court had jurisdiction to hear the case. 450 U.S. at 633-635.

In effect, therefore, a majority of five justices in *San Diego G. & E.* agreed that government must pay just compensation for the period commencing on the date that its regulation first effected the "taking" and ending on the date the government chooses to rescind or otherwise amend the regulation. Id., at 653 (Brennan, J., dissenting).

The federal courts sitting in California have read *San Diego G. & E.* as disapproving of *Agins*. The Ninth Circuit Court of Appeals, for example, reversed a summary judgment decision against a landowner suing a city and water district in California for damages under 42 U.S.C. section 1983 because the court felt that ". . . the present vitality of this aspect of *Agins* [the invalidation remedy] has been substantially undercut by Justice Brennan's dissenting opinion in *San Diego Gas and Electric Co. v. City of San Diego . . .*" *Martino v. Santa Clara Valley Water District*, 703 F.2d at 1141 (1983); see also, *American Savings & Loan Assoc. v. County of Marin*, 653 F.2d 364, 372 (9th Cir. 1981); *In re Air Crash In Bali, Indonesia on April 22, 1974*, 684 F.2d 1301, 1311 n. 7 (9th Cir. 1981); *Hernandez v. City of LaFayette*, 643 F.2d 1188, 1198-1200 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982), *affd. after remand*, 699 F.2d 734 ('1983).

Yet uncertainty remains hanging over lower federal courts as to this Court's anticipated, but yet undelivered, opinion on remedies under the 'taking' clause of the fifth amendment. That uncertainty has become ominous by virtue of the Court's indica-

tion that, but for lack of finality, the issue would have been addressed in *Hamilton Bank, supra.*

3. *The Prohibition on Inverse Condemnation is contrary to the decisions of the Courts of last resort of other states.*

Other jurisdictions have rejected the California Supreme Court's ruling in *Agins.* The New Hampshire Supreme Court's decision in *Burrows v. City of Keene,* 432 A.2d 15 (N.H. 1981), for example, flatly rejected the rule of *Agins.* When the defendant City of Keene attempted to assert the defense that the developer could not recover damages for inverse condemnation but must be satisfied only with the remedies of mandamus and/or declaratory relief, the court stated that "we reject this approach out of hand." *Id.*, at 20. The New Hampshire court continued:

> We agree with Justice Brennan that it is always open to the governmental entity involved to rescind or repeal the offending regulation and thus avoid payment of damages for inverse condemnation from that point on [citation]. Until that is done, however, the owner's property has been taken during the interim and he is entitled to compensation for that taking. [citation]. Limiting the landowner to actions which only invalidate the offending regulation will encourage municipal planners and other public officials to attempt to throw the burdens of accompanying "progress" upon individual land owners rather than on the public at large. The allowance of damages for inverse condemnation during the period of the taking, however, should encourage such officials to stay well on the constitutional side on the line, *San Diego Gas and Electric Co. v. City of San Diego, supra,* at 1308 n. 26 (Brennan, J. dissenting), and should also discourage harassment of property owners by repeated amendments of zoning regulations and the enactment of new ones.

Id. at 20. *See, also, Eck v. City of Bismarck,* 283 N.W.2d 193, 200-201 (N.D. 1979) (refusing to disallow all actions for inverse-condemnation damages). *Sheerr v. Township of Evesham,* 184

N.J. Super, 11, 445 A.2d 46, 53-54, 74-75 (1982) (awarding damages and apparently rejecting the California *Agins* decision).

Clearly, the present stance of the California state courts, on this constitutional issue is diametrically opposed to that of the dissent in *San Diego G. & E.*, many lower federal courts, and the courts of last resort of other states. *See Zinn v. Wisconsin*, 112 Wis.3d 417, 334 N.W. 2d 61, 73 (1983) (approving dissent in *San Diego G. & E.); Ripley v. City of Lincoln*, 330 N.W.3d 505 (N.D. 1983) (same).

Under the supremacy clause of the United States Constitution Article VI, clause 2, precedent of this Court should control the California Supreme Court's interpretation of the fifth amendment. However, until this Court takes a definitive stand on this issue, the courts of California will continue to stray from the requirements of constitutional law, and plaintiffs in California land-use cases will continue to be deprived of their constitutional rights and remedies. *See, e.g. Aptos Seascape Corp. v. County of Santa Cruz*, 138 Cal.App.3d 484, 493-494 (1982), appeal dismissed 104 U.S. 53 (1983).

II. THE CALIFORNIA COURT OF APPEAL HAS DECIDED THAT PETITIONER HELD NO VESTED RIGHT IN PHASE TWO OF ITS PROJECT IN CONFLICT WITH CONTROLLING DECISIONS OF THIS COURT ON THE DEFINITION OF VESTED PROPERTY RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS.

1. *Petitioner held Vested Rights in Phase Two.*

The Court of Appeal agreed with the decision of the trial court in holding that Petitioner's rights in Phase Two of its project had not vested.

The Court of Appeal misinterpreted and misapplied controlling precedent of this Court.

The most significant precedent is *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). That decision recognized the chaotic state of the law on the 'taking' question. To help provide the courts with guidance as to what constitutes a taking and when a vested right should be recognized, this Court aritculated a test called the "reasonable investment-backed expectation test" consisting of three components:

1. The owner's reasonable reliance upon a previous regulatory condition or official course of conduct;

2. The owner's investment in an existing use which the regulation curtails; and

3. An unusually unbalanced distribution of benefits (upon others among the public) and of burdens (upon this and/or other owners) accomplished by the regulations. *See* 438 U.S. at 124-5.

In this case CHP possessed a reasonable investment-backed expectation in being allowed to complete Phase Two. CHP had expended almost one million dollars in reliance upon the City's earlier promises that Phase Two could be completed according to the P-C development schedule. The loss of this money, however, pales in comparison to such damages as lost profits on the rental income CHP would have received had the City not stopped CHP's project. Nowhere in the record below did the California Courts identify, weigh, or balance any benefit the city could expect to receive for precluding CHP from completing Phase Two. The record is only replete with the burden that CHP has been forced to bear.

Unlike the plaintiff in *Penn Central*, CHP had received an initial approval for development within the 'air space' above the four-story building in Phase I. Indeed, the City of Palo Alto, by virtue of the P-C Ordinance, was responsible for severing the 'air space' within Phase Two. Hence it is not CHP who has created an artificial division of the property into segments. The reasoning

of *Penn Central* leads to finding a 'taking' here. *American Savings & Loan Assoc. v. County of Marin*, 653 F.2d 364 (9th Cir. 1981).

Critical to this Court's decision was the fact that, while the City of New York could stop Penn Central from building a 50-plus story office building, the City of New York would still have allowed construction of a 20-story addition to the current building on the site. *Id.*, at 136-137. Moreover, the City would also have allowed Penn Central to build its proposed 50-story plus building on at least eight parcels in the vicinity of Penn Central's property. Here CHP has received no compensatory development rights at all for the air rights for the six additional stories.

The City of Palo Alto has, in contrast, entirely precluded CHP from building any additional stories. It also has not offered any form of compensation that could work as a set-off to the damage CHP suffered due to Palo Alto's reprehensible actions.

This Court has extended *Penn Central* to physical invasions by government.

In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), a Hawaii residential marina was privately developed by dredging and filling a pond. The federal government then declared the pond to be a navigable waterway and asserted public right of access. Applying the three-part *Penn Central* test, this Court found a taking. One of the key findings was the fact that the developer had asked the Corps of Engineers whether the dredging of an existing shallow channel would turn its private property into a navigable waterway. 444 U.S., at 168. The Corps said it would not. Thus, when the government attempted to assert its jurisdiction over the waterway at a later date, it had to pay compensation.

The parallel with the present case is clear. Just as the developer in *Kaiser Aetna* relied on the word of the Corps of Engineers, CHP relied on the past conduct and express assur-

ances of the City of Palo Alto that it would be able to proceed with Phase Two. Indeed, CHP relied upon the City's own P-C Ordinance. CHP relied on City assurances when it completed Phase One to accommodate Phase Two and also when preparing plans for Phase Two's additional six stories, purchasing the structural steel, and the two elevators for the same. CHP's rights were further vested when a building permit issued for Phase Two. The City could not renege after it knew CHP had spent nearly $1,000,000 in reliance on the City's assurances to complete Phase Two.

The definition of "vested rights" for the purposes of a "taking" analysis under the fifth amendment to the United States Constitution is an important federal question to which the conclusions of the California Courts have given a misguided answer. Unless this Court corrects the aberrant position of the California courts on this issue, plaintiffs in California land-use cases will continue to be deprived of their constitutional right to substantive due process.

2. *The Doctrine of Res Judicata Should Not Be Applied to Parrallel Actions which seek different remedies where one of the actions was a suit for mandamus which was decided on an incorrect analysis of "vested rights".*

The California Court of Appeal stated: "the prior appellate opinion shows that a central issue was whether the developer had acquired a vested right to building and use permits. (*Court House Plaza Co. v. City of Palo Alto, supra,* 117 Cal.App.3d 871, 884-887.)" Appendix B1, p. B-6.

So the erroneous conclusion of the California trial court in *CHP I* in regard to the "vested rights" question has been used to block any substantive review of the question of damages for inverse condemnation in this case.

CHP's right to damages for inverse condemnation was not and could not have been determined in *CHP I* since while that

mandamus action was pending, such a cause of action did not exist in California. As the California Court of Appeal itself noted in referring to *CHP I*: ". . . [d]amages were never prayed for in the petition nor did the trial court reach the issue of the availability of damages for inverse condemnation." Appendix A, slip opinion, pp. 10-11. Inconsistently with that perception, the California Court of Appeal proceeded to affirm the dismissal of CHP's complaint on the ground of *res judicata*.

This Court's reassertion of federal 'takings' law made possible the reactivation of *CHP II*. Every precedent in this Court cited in the Petition was handed down after the trial court's judgment in *CHP I* (except only *Penn Central*, decided a few months earlier).

Only by presuming that Petitioner's fifth amendment claim had been earlier adjudicated in *CHP I*, under the amorphous rubric of "vested rights," could the Court of Appeal have reached its decision with confidence. But, as stated above, the 'vested right' determination in *CHP I* did not derive from any constitutionally-sufficient 'taking' analysis. Hence any suggestion that *CHP I* gave Petitioner its day in court on the fifth amendment issue presented here cannot endure the test of history, truth, and legal analysis.

Any determination of Petitioner's "vested rights" in *CHP I* could not possibly constituted a 'taking' analysis complying with this Court's criteria. This Court's opinion in *Hamilton Bank* reiterated the two main factors in the analysis, as defined in *Penn Central*, 438 U.S., at 124, and subsequent decisions: ". . . this Court consistently has indicated that among the factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations." *Hamilton Bank*, ___, U.S. at ___, 105 S.Ct., at 3119. Nothing of the sort occurred in *CHP I*, because there the trial court ruled on the question of 'vested rights' mainly to fix the standard of review for mandamus. Nothing in the record before the Court

of Appeal in this case warrants any other conclusion. Evidence of a constitutionally-sufficient 'taking' analysis can nowhere be found.

A definitive statement by this Court as to the due process rights of landowners to damages for the loss of property defined "vested rights" in inverse condemnation suits is necessary in order to avoid the inequitable application of the doctrine of *res judicata* in this case.

Unless the judgment of the California Court of Appeal is reversed, Petitioner will never have an opportunity to present its claim for damages to any court disposed to recognize and to rule fairly on such a claim.

III. THIS CASE IS RIPE FOR ADJUDICATION IN THIS COURT. NO VARIANCE WAS NEEDED OR OBTAINABLE UNDER THE ORIGINAL ZONING OF PETITIONER'S PROJECT, AND NO INVERSE CONDEMNATION PROCEEDING FOR DAMAGES WAS OR IS AVAILABLE AND ADEQUATE UNDER CALIFORNIA LAW.

In this Court's recent opinion this Court stated that before a claim may be made the property owner must first have "... unsuccessfully attempted to obtain just compensation through procedures provided by the State for obtaining such compensation ..." *Hamilton Bank*, ____ U.S., at ____, 105 S.Ct., at 3121.

This Court went on to state that a 'taking' claim will be considered premature until the owner has exhausted any local variance procedures and has shown that any inverse condemnation procedure is unavailable or inadequate.

The present case complies with the dictates of the *Hamilton Bank* opinion. No variance procedure was available to Petitioner after the City Coucil's action. (Appendix E4 Section 18.90.090). The City Council denied finally any extension of the development schedule. No further relief was available from the City of

Palo Alto or the State of California. Because the P-C Ordinance had originally approved all physical parameters of both Phase One and Phase Two, Petitioner had no need to seek a variance for any aspect of the project, including the building's height. Petitioner needed only more time to complete Phase Two as approved and would not have needed that but for the delaying tactics of the City of Palo Alto.

No adequate inverse condemnation procedure is available in California since the California courts do not recognize damages as an appropriate remedy in this type of case, as discussed in the preceding sections of this Petition. Moreover, Petitioner had exhausted its equitable remedy in *CHP I*, in strict obedience with the existing, though constitutionally-infirm, procedures of the California courts. No greater effort to exhaust remedies can, or should be, demanded by a humane judiciary.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

FLEHR, HOHBACH, TEST,
ALBRITTON & HERBERT

By /s/ Harold C. Hohbach
Harold C. Hohbach

Counsel for Appellant

August 18, 1985

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA)
) ss.
CITY AND COUNTY OF)
FRANCISCO)

Harold C. Hohbach, being first duly sworn upon his oath, deposes and says that he is a member of the Bar of this Court and one of the counsel of record for Petitioner in this cause; that on this 18th day of August, 1985, he mailed three copies of Petitioner's Petition for Writ of Certiorari in this cause by depositing same in the United States mail, first-class postage prepaid to:

Diane M. Lee
City Attorney
250 Hamilton Avenue
Palo Alto, CA 94301

Fred Caploe
Williams & Caploe
1060 Grant St., Suite 201
P.O. Box 698
Benicia, CA 94510

and that he also mailed forty copies of Petitioner's Petition for a Writ of Certiorari to the Clerk of this Court, first-class postage prepaid, all in compliance with Supreme Court Rule 28.

/s/ Harold C. Hohbach
HAROLD C. HOHBACH

SUBSCRIBED AND SWORN to before me this 18th day of August, 1985.

Witness my hand and official seal.

/s/ Nancy A. Davidson
NANCY A. DAVIDSON
NOTARY PUBLIC

My commission expires October 30, 1987

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APPENDIX A

(1) First Amended Complaint for Inverse Condemnation, Deprivation of Constitutional Rights, and Declaratory Relief

(2) Demurrers to First Amended Complaint

(3) Memorandum of Decision and Order after Hearing on Motion to Strike and Demurrer to the First Amended Complaint

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA

COURT HOUSE PLAZA COMPANY, a limited partnership, Plaintiff, v. THE CITY OF PALO ALTO, a municipal corporation, STANLEY R. NORTON, BYRON D. SHER, FRED S. EYERLY, ROY L. CLAY, KIRKE W. COMSTOCK, SCOTT T. CAREY, JOHN J. BERWALD, ANNE R. WITHERSPOON, JOHN V. BEARS, Councilmen, PETER R. CARPENTER, MARY R. GORDON, WILLIAM E. GREEN, JAY W. MITCHELL, EMILY M. RENZEL, ANNE STEINBERG, Planning Commissioners, STAN J. NOWICKI, Chief Building Inspector, JAMES O. GLANVILLE, Zoning Administrator, NAPTHALI H. KNOX, Director of Planning and Community Environment, ROBERT K. BOOTH, JR., City Attorney and LOUIS B. GREEN, Assistant City Attorney, Defendants.	Civil No. P33070 FIRST AMENDED COMPLAINT FOR INVERSE CONDEMNATION, DEPRIVATION OF CONSTITUTIONAL RIGHTS, AND DECLARATORY RELIEF

Plaintiff alleges:

FIRST CAUSE OF ACTION

[Inverse Condemnation – United States Constitution]

(Parties to this Action)

1. Plaintiff, COURT HOUSE PLAZA COMPANY, is a limited partnership formed and existing under the California Limited Partnership Act (Corporations Code § 15500 *et seq.*) Plaintiff does business under the name of COURT HOUSE PLAZA COMPANY and has complied with the provisions of California law (Business and Professions Code § 17910 *et seq.*) for the filing and publication of a certificate stating such fictitious business name. Plaintiff is the successor-in-interest to California Lands Building Company, a California general partnership, the former owner of the property in question here until about October of 1971.

2. Plaintiff's principal place of business, and the property in question are located within, and the acts of Defendants described in this Complaint, all occurred within, the County of Santa Clara, California.

3. Plaintiff is the fee owner of real property located at 260 Sheridan Avenue, City of Palo Alto, County of Santa Clara, State of California.

4. Defendant, THE CITY OF PALO ALTO ("the CITY"), is now, and at all times pertinent to this action was, a municipal corporation organized and existing under the laws of the State of California as a charter city and located in the County of Santa Clara, State of California.

5. Defendants STANLEY R. NORTON, BRYON D. SHER, FRED S. EYERLY, ROY L. CLAY, KIRKE W. COMSTOCK, SCOTT T. CAREY, JOHN T. BERWALD, ANNE R. WITHERSPOON and JOHN V. BEAHRS were, on and before December 6, 1976, members of the City Council of the CITY.

   Defendants PETER F. CARPENTER, MARY GORDON, WILLIAM E. GREEN, JAY W. MITCHELL, EMILY M.

RENZEL nad ANNE STEINBERG were, on and before December 6, 1976, members of the Planning Commission of the CITY.

Defendants STANLEY J. NOWICKI, JAMES O. GLANVILLE, NAPHTALI H. KNOX, ROBERT K. BOOTH, JR., and LOUIS B. GREEN were, on or before December 6, 1976, respectively, the Chief Building Inspector, the Zoning Administrator, the Director of Planning and Community Environment, the City Attorney, and the Assistant City Attorney of the CITY.

6. At all times pertinent to this action, Defendants, individually and collectively, acted in concert to cause Plaintiff's injury as described in this Complaint; and the individual Defendants served as the agents and/or employees of Defendant CITY and of each other and at all times acted within the scope of such agency and employment.

[History of the Project: Acquisition of Vested Rights]

7. The CITY adopted Ordinance No. 2224 on December 28, 1964 (the "P-C Ordinance"). The P-C Ordinance placed Plaintiff's property in a "P-C" zone; that is, a zone for professional and commercial office use. The P-C Ordinance also approved (by incorporation) Plaintiff's development plans for ten-story office building; and these plans consisted of detailed drawings showing the location, elevation, and floor plan of the building, the related parking garage, and other details of the site development (the "Project").

8. The P-C Ordinance contained certain conditions:
   (a) "Building location, dimensions, heights and other improvements shall be substantially as indicated on the approved Development Plan."
   (b) Off-street parking space shall be provided, the number of spaces to be at the ratio of one for each 144

square feet of floor area in the ground floors and one parking space for each 288 square feet of floor space in the upper floors.

(c) The ten-story building shall be built according to a development schedule providing that, in Phase 1, "start of construction of the four-story office building" and the "parking garage" shall be "within two years of Council approval" and, in Phase 2, "start of construction of the fifth to and including the tenth story" and "additional levels of the parking garage" shall be "by October 31, 1976."

The development schedule contained in the P-C Ordinance rested upon an understanding between Plaintiff and City officials that the phasing of the Project would enable Plaintiff to complete the Project when the demand for office space in the CITY made completion economically feasible.

9. Soon after adoption of the P-C Ordinance Plaintiff prepared architectural plans for the entire ten-story building. On June 14, 1966, the CITY issued a building permit for Phase 1. On January 17, 1966, the CITY issued a use permit for Phase 1. In reliance upon these permits and with the guidance of its architectural plans for the ten-story building, Plaintiff commenced construction of Phase 1, within the two-year period required under the development schedule of the P-C Ordinance, and completed construction in about August of 1967.

10. The first four stories of the building completed in Phase 1 incorporated structural elements designed to support the remaining six stories in Phase 2. Among these structural elements, costing over $450,000, were the following:

(a) A foundation capable in sustaining all ten floors;

(b) Structural steel of sufficient strength to support the remaining six floors;

(c) Heating and cooling equipment placed in the basement instead of upon the roof, in order to permit construction of the remaining six floors without interrupting service to the first four floors;

(d) Two additional elevator shafts to accommodate elevators for the remaining six floors;

(e) An interior smokeproof tower for fire safety purposes, not necessary in a four-story building;

(f) Extra electrical, water and sewage capacity permitting hook-up of facilities on the remaining six floors.

11. In so completing Phase 1 and thereby commencing actual construction of Phase 2, Plaintiff acquired a vested right to complete Phase 2 under regulations in effect on the date that the P-C Ordinance was adopted. Plaintiff reasonably expected that it might complete Phase 2 under such regulations based upon the conduct of Defendants in issuing building and use permits for commencement of the Project; and Plaintiff's investment in the Project in 1966 and succeeding years resulted from that reasonable expectation.

[The Parking Problem]

12. Because the parking garage contemplated by the P-C Ordinance would have interfered with the CITY's plan for realignment of Page Mill Road, the CITY did not require Plaintiff to begin construction of the garage within the two years provided in the development schedule. On December 13, 1965 the CITY adopted Resolution No. 3860 requiring Plaintiff to provide 107 off-street parking spaces instead of the garage. The CITY thereby acknowledged its responsibility for impeding Plaintiff's construction of the parking garage and indicated officially its willingness to cooperate with Plaintiff in resolving the parking problem.

13. Thereafter CITY engaged in a course of conduct which effectively aggravated the parking problem, prevented its resolution, and thwarted Plaintiff in its efforts to satisfy

the condition of the P-C Ordinance regarding parking spaces. The CITY's course of conduct included, among others, the following acts:

(a) The CITY failed to resolve with the County of Santa Clara the design of the Page Mill Road realignment.

(b) On December 11, 1967, the CITY adopted Resolution No. 4055 extending time for the commencement of construction of the parking garage by one year. On May 6, 1968 the CITY adopted Resolution No. 4113, rescinding Resolution Nos. 3860 and 4055, substituting 107 attendant parking spaces on the surface in place of a parking garage, and allowing until October 31, 1976, for Plaintiff to commence construction of the parking garage.

(c) By agreement with the County of Santa Clara, the CITY consented to the County's acquiring, under a final order of condemnation entered on August 21, 1970, a portion of the land Plaintiff intended to use for construction of the parking garage, making its construction impossible.

(d) In connection with the foregoing condemnation, the CITY sold the County, and the County conveyed to Plaintiff as partial compensation, a small piece of land supposedly usable for the parking garage, but known to the CITY not to be usable under CITY's own requirements for design and construction.

(e) On March 31, 1975, the CITY resolved to acquire six parcels of land (the "Power parcels") for eventual development by the CITY for low-and moderate-income housing. At the time of this Resolution the CITY knew that Plaintiff had once invested funds in acquiring an option to purchase, and later in purchasing, the Power parcels as a means of resolving the parking problem. Although no longer the owner after 1973, Plaintiff remained interested in using the Power parcels for parking for the Project.

By these and other acts the CITY defeated Plaintiff's reasonable expectation that the CITY would with Plaintiff cooperate to satisfy the parking requirements for the Project before October 31, 1976.

[City's Dilatory and Arbitrary Administrative Acts]

14. In the Fall of 1968 Plaintiff completed construction drawings for Phase 2. The demand for office space then justified completion of Phase 2. In October of 1969 Plaintiff arranged financing for construction, directed its general contractor to commence the placement of construction subcontractors for the remainder of Phase 2, and particularly for structural steel and elevators for the six-story addition.

15. Plaintiff applied for a building permit on December 1, 1969. Instead of issuing a building permit promptly according to the regulations fixed by the P-C Ordinance, Defendants arbitrarily insisted that the smokeproof tower shown in the construction plans did not comply with the CITY's Building Code as amended after the P-C Ordinance. This dispute between Plaintiff and Defendants was not resolved until after the Assistant City Attorney ruled that Plaintiff had acquired vested rights in a ten-story office building, to be completed with an interior smokeshaft and without a fire sprinkler system, under the P-C Ordinance. The CITY finally issued the building permit on February 16, 1970.

16. Plaintiff applied for a use permit on February 13, 1970. Again Defendants arbitrarily objected to this application on the ground that the ten-story building, when completed, would be fourteen feet higher than the building shown in the drawings incorporated into the P-C Ordinance, even though Defendants knew that the P-C Ordinance required building heights to be only substantially as indicated on the approved Development Plan." The fourteen-foot height difference derived from the need for more space

between the floors to accommodate heating and ventilation equipment. The first four floors built in Phase 1 had already included the extra spacing. Because the CITY's Zoning Administrator objected to the difference in height, Plaintiff was required to request the CITY's Planning Commission to overrule the Zoning Administrator. On March 30, 1970 the City Council approved the Planning Commission's favorable ruling and issued the use permit, thereby ruling officially that the fourteen-foot height difference substantially complied with the P-C Ordinance.

17. While the CITY so delayed in issuing building and use permits to Plaintiff for the completion of Phase 2, the CITY also approved, on September 22, 1969, the nearby Palo Alto Square Project consisting of two ten-story office towers competing directly with Plaintiff's Project. The Palo Alto Square Project created a surplus of professional and commercial office space in the vicinity and so rendered the completion of Phase 2 by Plaintiff not viable economically for several years under then-prevailing business and financial conditions.

18. Notwithstanding its own financial difficulties and the saturated market for office space, Plaintiff again applied for a use permit to complete Phase 2, following the expiration of the use permit issued on February 13, 1970. Plaintiff's new application was filed on February 27, 1973 and requested a use permit identical to the one issued in 1970. Despite the fact that the City Council had already declared officially that the fourteen-foot height difference complied substantially with the P-C Ordinance, the CITY's Zoning Administrator indicated his intent to deny the new application because of that difference. In the face of this arbitrary objection, Plaintiff withdrew this application on March 30, 1973.

19. In September of 1973 the CITY adopted an interim Ordi-

nance No. 2745 limiting the height of new structures to fifty feet. The CITY incorporated this fifty-foot height limit into its new comprehensive plan in 1976.

20. In late 1975 the market for professional and commercial office space finally improved. The competitive Palo Alto Square Project was then almost completely leased. The renewed demand for office space and the availability of construction financing combined to render the completion of Phase 2 of the Project economically feasible once again.

21. In September of 1975 Plaintiff renewed discussions with Defendants regarding the completion of Phase 2. In response, Defendants resumed a course of conduct intended to delay Plaintiff, prevent completion of Phase 2, deprive Plaintiff of its vested rights, and to frustrate Plaintiff's reasonable investment-backed expectation that it could complete the Project under the P-C Ordinance and the regulations in effect when the P-C Ordinance was adopted. Among the acts comprising such course of conduct were the following:

    (a) After Plaintiff applied on June 30, 1976 for a change in the P-C zone to resolve the parking problem, the CITY's Zoning Administrator unreasonably objected to such application on the ground that it included land not owned by Plaintiff and for which Plaintiff requested contingent P-C zoning. Consequently, Plaintiff acquired the described land on September 11, 1976. Notwithstanding Plaintiff's expenditures of time, money, and personal efforts the zone-change application was never finally processed by the CITY before October 31, 1976, the end of the development schedule under the P-C Ordinance.

    (b) In the face of objections to its zone-change application, Plaintiff applied for a three-year extension of the development schedule on the suggestion of the Zoning Administrator. The Planning Commission de-

nied this extension on August 25, 1976, despite the fact that Section 18.68 of the CITY's Municipal Code provides that an extension of a development schedule may be recommended by the Planning Commission "for good cause shown by the property owner in writing." Plaintiff appealed the denial to the City Council, and the Council placed the appeal on its agenda. On the advice by the Mayor of the CITY and other council-members that the appeal would prove too controversial, Plaintiff withdrew the appeal on September 11, 1976.

(c) On August 27, 1976 Plaintiff applied for another use permit for the same ten-story building for which the use permit had issued in 1970. On August 31, 1976 Plaintiff also applied for a building permit, submitting the same plans submitted to the CITY in 1969. The City's Zoning Administrator and Building Inspector refused to act on either of these applications, notwithstanding the fact that Plaintiff then possessed a right to obtain the use and building permits described in the applications pursuant to the P-C Ordinance.

(d) After Plaintiff requested on October 1, 1976 a one-year extension of the development schedule, Defendants again sought to impose upon Plaintiff's request regulations adopted after the P-C Ordinance, in particular the California Environmental Quality Act of 1973. On October 27, 1976 the Planning Commission denied the request for one-year extension and, at the same time, continued the still-pending zone-change application. Plaintiff appealed the denial of the extension of the City Council. On December 6, 1976 the City Council denied the appeal, thereby finally ruling that the development schedule ending on October 31, 1976 would not be extended.

(e) The CITY never issued another building or use permit for completion of Phase 2. The City, in failing to is-

sue such permits, relied upon grounds not authorized by the P-C Ordinance but imposed by regulations adopted subsequently thereto.

22. Plaintiff demonstrated, as required by Section 18.68 of CITY's Municipal Code, "good cause" for the one-year extension. Such good cause consisted in the history of the Project described above. As early as May 23, 1968, when the City Attorney wrote to Plaintiff concerning the availability of extensions to a development schedule, Plaintiff formed the reasonable expectation that, because the CITY had in fact customarily granted such extensions to other applicants, Plaintiff would also be granted an extension upon its request for good cause shown.

23. During the course of the history of the Project described above, Plaintiff invested these funds in the Phase 2 of the Project:
    (a) $450,000 for the structural elements incorporated in Phase 1 as part of the construction of Phase 2.
    (b) More than $65,000 for the preparation of architectural plans for the remaining six stories of the building.
    (c) More than $450,000 for the fabrication of structural steel and elevators for the remaining six stories, expended in good faith reliance on the timely processing of Plaintiff's application for a building permit finally issued after delays on February 16, 1970.
    (d) More than $20,000 for the preparation of revised plans and specifications to comply with the 1973 Uniform Building Code adopted in Palo Alto, in good-faith effort to compromise with the CITY, and an additional $5,000 or more in legal fees in connection with hearings before the Planning Commission and City Council.
    (e) In excess of $10,000 for parking studies and revised parking plans submitted to the Planning Commission.
    (f) $20,000 for the purchase of the six Power parcels to solve the parking needs for the ten-story building.

(g) $87,000 for acquisition of the Pierson parcel to overcome the CITY's objection to Plaintiff's zone-change application in September of 1976.

(h) In excess of $160,000 in total for parcels located at 228 Sheridan Avenue, 230 Sheridan Avenue, 320 Sheridan Avenue, and 2660 Park Boulevard, all near the Project, as possible sites for parking.

The above items constitute special damages suffered by Plaintiff as a result of Defendant's preventing completion of Phase 2. Plaintiff has also suffered additional special damages, the full nature and extent of which Plaintiff does not know, but will allege and prove at the appropriate time.

24. In addition, Plaintiff has suffered general damages in amounts not now known, including, but not limited to, the following:

(a) Loss of time by, and inconvenience to, its partners and the partners of its predecessor general partnership.

(b) Loss of profits from the existing four-story building.

(c) Loss of profits from the remaining six stories of the building which Plaintiff has a right to complete.

(d) Loss of increased appreciation in the four-story building and the remaining six stories together with the parking garage as a complete, integrated project.

Plaintiff has also suffered additional general damages, the full nature and extent of which Plaintiff does not know, but will allege and prove at the appropriate time.

25. By their conduct Defendants have appropriated, and taken without payment of just compensation, Plaintiff's property as described in paragraphs 23 and 24 preceding as well as the air-space above the existing four-story building, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

SECOND CAUSE OF ACTION

[Inverse Condemnation–California Constitution Art. 1, § 19]

26. Plaintiff refers to, incorporates herein by reference in their entirety, and realleges the allegations contained in paragraphs 1 through 24, inclusive, of this Complaint.

27. By their conduct Defendants have confiscated, appropriated, and taken without payment of just compensation Plaintiff's property as described in paragraphs 23 and 24 above as well as the air-space above the existing four-story building; and such taking and/or damaging of property violates Article 1, § 19 of the Constitution of the State of California.

28. Plaintiff is entitled to recover its reasonable costs, disbursements, and expenses, including attorney's and expert fees, pursuant to Section 1036 of the California Code of Civil Procedure.

THIRD CAUSE OF ACTION

[Denial of Equal Protection and Due Process of Law Under the Fourteenth Amendment, U.S. Constitution]

29. Plaintiff refers to, incorporates herein by reference in their entirety, and realleges the allegations of paragraphs 1 through 24, inclusive, of this Complaint.

30. In denying Plaintiff an extension of the development schedule contained in the P-C Ordinance, while routinely granting extensions to other applicants upon a showing of good cause under Section 18.68 of the City's Municipal Code, Defendants have unlawfully discriminated against Plaintiff, thereby denying to Plaintiff equal protection under the laws and depriving Plaintiff of its rights to due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

31. In seeking to apply to the Project regulations adopted after the P-C Ordinance and after Plaintiff had acquired a vested right to complete Phase 2 under the P-C Ordinance and regulations in effect at the time of its adoption, Defendants have deprived Plaintiff of its right to substantive due process of law in violation of the Fourteenth and Fifth Amendments to the Constitution of the United States.

FOURTH CAUSE OF ACTION

[Denial of Equal Protection and Due Process of Law under Art. 1, § 7 of the California Constitution]

32. Plaintiff refers to, incorporates herein by reference in their entirety, and realleges the allegations of paragraphs 1 through 24, inclusive, of this Complaint.

33. In denying Plaintiff an extension of the development schedule contained in the P-C Ordinance, while routinely granting extensions to other property owners upon a showing of good cause under Section 18.68 of the CITY's Municipal Code, Defendants have unlawfully discriminated against Plaintiff, thereby denying Plaintiff equal protection under the laws and depriving Plaintiff of its right to due process of law in violation of Article 1, Section 7 of the Constitution of the State of California.

34. In seeking to apply requirements created by regulations adopted after the P-C Ordinance and after Plaintiff had acquired a vested right to complete Phase 2 under the P-C Ordinance and regulations in effect at the time of its adoption, Defendants have deprived Plaintiff of its right to substantive due process of law in violation of the Constitution of the State of California.

FIFTH CAUSE OF ACTION

[Deprivation of Constitutional Rights–Federal Civil Rights Act]

35. Plaintiff refers to, incorporates herein by reference in their

entirety, and realleges the allegations of paragraphs 1 through 25 and paragraphs 29 through 31, inclusive, of this Complaint.

36. Through their conduct as described above, Defendants have, under color of state law and municipal ordinances and regulations, deprived Plaintiff of its rights, privileges, and immunities secured by the Constitution of the United States and, in particular, the Fifth and Fourteenth Amendments thereto, in violation of Sections 1981 and following of Title 42 of the United States Code.

37. For such violation Plaintiff is entitled to recover special and general damages as described in paragraphs 23 and 24 of the First Cause of Action.

38. As an alternative to such special and general damages, Plaintiff is entitled to equitable relief to restore the deprivation of its rights, privileges, and immunities by Defendants. Such equitable relief consists in a mandatory injunction from this Court directing Defendants to permit Plaintiff to complete Phase 2 of the Project under the P-C Ordinance and regulations in the effect at the time of its adoption, without further discretionary approvals by the CITY. In addition to such relief, Plaintiff is entitled to interim damages actually suffered during the period in which Defendants prevented Plaintiff from completing Phase 2; and Plaintiff asks leave to allege the amount of such damages and to prove the same when the amount becomes known.

SIXTH CAUSE OF ACTION

[Declaratory Relief]

39. Plaintiff refers to, incorporates herein by reference in their entirety, and realleges the allegations of paragraphs 1 through 38, inclusive, of this Complaint.

40. An actual controversy has arisen now exists between the Plaintiff, on the one hand, and Defendants, on the other

hand, concerning their respective rights and duties in connection with the Project. Plaintiff contends that it has the right either

(a) to complete Phase 2 under the P-C Ordinance and the regulations in effect at the time of its adoption without further discretionary approvals by the CITY and, in addition, to receive full compensation for actual damages suffered during the period in which the CITY prevented completion of Phase 2 or, in the alternative,

(b) to receive full compensation for all special and general damages heretofore suffered by Plaintiff as a result of Defendant's conduct described above.

41. Plaintiff is informed and believes, and alleges on the basis of such information and belief, that Defendants do not accept Plaintiff's contention but take a contrary position.

42. Plaintiff desires an immediate declaration of its rights in the Project. Such declaration is necessary and appropriate in order to resolve the controversy between Plaintiff and Defendants and to eliminate the injury previously suffered, and still being suffered, by Plaintiff so long as Defendants prevent Plaintiff from completing Phase 2 of the Project.

WHEREFORE Plaintiff prays for judgment against Defendants, and each of them, as follows:

1. For the special damages described in paragraph 23 above according to proof.

2. For the general damages described in paragraph 24 above according to proof.

3. A declaration of the respective rights, duties and obligations of the parties.

4. Plaintiff's reasonable attorneys' fees in this action.

5. Costs arising from the prosecution of this action.

6. Interest as provided by law and determined by this Court on all items of special and general damages requested in paragraphs 1 and 2 of this prayer.

7. For such other, further and additional relief as this Court may deem appropriate.

In the alternative, Plaintiff prays for judgment against Defendants, and each of them, as follows:

A. Equitable relief in the nature of a mandatory injunction allowing Plaintiff to complete Phase 2 of the Project under the P-C Ordinance and the regulations in effect at the time of its adoption without further discretionary approvals by CITY.

B. Interim damages in the amount to be proven at trial for losses, costs, and expenses incurred by Plaintiff during the period in which Defendants prevented the completion of Phase 2 of the Project.

C. Costs arising from the prosecution of this action.

D. Plaintiff's reasonable attorneys' fees in this action.

E. Interest as provided by law and determined by this Court on all of the losses, costs and expenses described in paragraph B of this alternative prayer.

F. For such other, further and additional relief as the Court may deem appropriate.

Dated: February 26, 1982.

BERLINER, COHEN & BIAGINI

By /s/
JEFFREY P. WIDMAN
Attorneys for Plaintiff

ROPERS, MAJESKI, KOHN, BENTLEY,
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84 West Santa Clara Street
San Jose, CA 95113
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Attorneys for Defendants
THE CITY OF PALO ALTO and
EACH INDIVIDUALLY NAMED DEFENDANT

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA

COURT HOUSE PLAZA COMPANY, a limited partnership,	) Civil No. P33070
Plaintiff,	) DEMURRERS TO
vs.	) FIRST AMENDED
	) COMPLAINT
THE CITY OF PALO ALTO, a municipal corporation, et al.,	) Date: April 26, 1982
	) Time: 9:30 a.m.
	) Dept.: One
Defendants.	) Est. Length of Hearing
	) 30 mins.

DEMURRERS

Comes now defendants THE CITY OF PALO ALTO and each individually named defendant and demur generally and specially to the first amended complaint as follows:

I

The first amended complaint, and each purported cause of action therein, fails to state facts sufficient to constitute any valid cause of action against any defendant.

II

The first amended complaint, and each purported cause of action therein, is uncertain in that it cannot be determined which cause of action, if any, is directed against any of the individually named defendants.

WHEREFORE, defendants pray that foregoing demurrers be sustained, that plaintiff recover nothing by its first amended complaint, that defendants be awarded judgment in their favor including costs of suit herein incurred, and for such other relief as the Court deems just and proper.

Dated: April 9, 1982. ROPERS, MAJESKI, KOHN, BENTLEY, WAGNER & KANE

By

Attorneys for Said Defendants

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA

COURT HOUSE PLAZA COMPANY,	)	No. P 33070
	)	
Plaintiff,	)	MEMORANDUM OF
	)	DECISION AND
vs.	)	ORDER AFTER
	)	HEARING ON MO-
THE CITY OF PALO ALTO,	)	TION TO STRIKE
	)	AND DEMURRER TO
Defendant.	)	THE FIRST AMENDED
	)	COMPLAINT

The plaintiff has notified the Court of a reservation of the claims arising under the United States Constitution and the Federal Civil Rights Act. This Court will therefore defer any adjudication with regard to the plaintiff's first, third, fourth and fifth causes of action pending outcome of Case No. C-81-4357-SZ currently filed in the United States District Court for the Northern District of California. Of necessity, the sixth cause of action requesting declaratory relief must await that litigation's outcome.

There remains only the plaintiff's second cause of action which is subject to the defendant's motions. The second cause of action basically seeks damages for inverse condemnation. The plaintiffs allege that they were prevented from constructing six additional floors to an existing four-story building because of a change in the zoning regulations by the City of Palo Alto.

The original plan for the building was a two-phase construction schedule and it is contended that the actions of the defendant City substantially deprived the plaintiff of full use of their property and that therefore the City should respond in damages under a theory of inverse condemnation.

Defendants have requested the Court to take judicial notice of the decisional law in *Court House Plaza vs. The City of Palo Alto* 117 CA3d 871 (1981) in which the Court held that plaintiff was not entitled to compensable damages under a theory of inverse condemnation. Such damages would include any that flow from interference with the use of air space.

Accordingly, the demurrer to the second cause of action is sustained on the grounds that that cause of action is barred by res judicata. Since there is no basis for an amendment, the demurrer is sustained without leave to amend.

DATED: June , 1982.

DAVID W. LEAHY
Judge of the Superior Court

APPENDIX B

(1) Opinion of the California Court of Appeal, Sixth Appellate District

(2) Denial of Petition for Rehearing to California Court of Appeal

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

COURT HOUSE PLAZA CO.,	) A019076
	)
Plaintiff and	) (Santa Clara County
Appellant,	) Super.Ct.No.
	) P 33070)
-vs.-	)
	)
CITY OF PALO ALTO, et al.,	)
	)
Defendants and	)
Respondents.	)

Plaintiff Court House Plaza Co. (developer) appeals from a judgment of dismissal following the sustaining without leave to amend of a demurrer on grounds of res judicata interposed by the defendant City of Palo Alto (City). The developer concedes that this action arises from "the same historical set of facts" as did its prior mandamus action against the City, wherein the judgment denying it relief was affirmed on appeal in *Court House Plaza Co.* v. *City of Palo Alto* (1981) 117 Cal.App.3d 871. The critical question in this appeal is: does that judgment bar the developer from seeking damages in inverse condemnation based on the same actions by the City? The trial court so decided, after taking judicial notice of the mandamus petition in that action, the detailed findings of fact and conclusions of law, and the appellate opinion. We agree with the court's decision.

THE DEMURRER

As explained in *Carrol* v. *Puritan Leasing Co.* (1978) 77 Cal.App.3d 481, 486: "It is now settled that a court may take

judicial notice of the official acts or records of any court in this state and any state of the United States. (Evid. Code, § 452.) Pursuant to this authority, a trial court may take notice of the prior judgment in deciding whether to sustain a demurrer based upon res judicata. (*Flores* v. *Arroyo* (1961) 56 Cal.2d 492, 496 . . . .) In analyzing a demurrer based upon res judicata the court will take judicial notice of a prior judgment, whether or not pleaded, provided only that (1) the court has been correctly apprised of the judgment, and, (2) the plaintiff is given adequate notice and opportunity to be heard as to the effect of the judgment. (*Flores* v. *Arroyo, supra,* at p. 496; Evid. Code, § 452, subd. (d), § 453.)"

On demurrer, the court is not required to assume the truth of allegations which contradict what is judicially noticed. (*Saltares* v. *Kristovich* (1970) 6 Cal.App.3d 504, 510, and cases there cited.) Numerous allegations in the amended complaint contradict the findings made in the prior action, but they need not be detailed to resolve this appeal.

FACTUAL SETTING

The "same historical set of facts" is essentially: (1) in December 1964 the City passed an ordinance providing for the construction by the developer of a ten-story building in two phases, with phase one consisting of a four-story building to be commenced before December 1966, and phase two consisting of the remaining six stories to be commenced before October 31, 1976; (2) the developer completed construction of phase one under permits for phase one by August 1967, "overbuilding" the first four stories at a cost of about $450,000 (e.g., by using stronger steel for a foundation) in anticipation of adding six more stories; (3) the developer also expended more than $450,000 for fabricating steel and elevators for the remaining six stories[1];

[1]The developer alleges this expenditure was made in reliance on the issuance of building and use permits for phase two (which subsequently expired). The trial court in the first action found that these obligations were undertaken in advance of issuance of the permits and before the developer had financing, which was why the permits expired.

(4) the City precluded construction of phase two in a number of ways, but most significantly by denying the developer's August and October 1976 applications for an extension of the development schedule and August 1976 requests for building permit and a use permit.

INVERSE CONDEMNATION

The first action, styled a petition for ordinary and administrative mandamus, was filed on May 23, 1977. This second action was filed September 22, 1977, although the parties apparently delayed litigation pending the outcome of the mandamus action. After a demurrer was sustained to the original complaint in this second action with leave to amend, an amended complaint was filed February 26, 1982, which purported to state six causes of action. Our concern is only with the second cause of action in inverse condemnation because in response to the City's demurrer and motion to strike the amended complaint, the developer filed a "notice of reservation of federal claims" on May 3, 1982, which conditionally withdrew all federal causes of action for resolution in a pending federal action filed December 3, 1981. (We judicially notice (Evid. Code, § 459) that on June 4, 1982, the federal district court dismissed the federal claims based on the res judicata effect of the earlier action, which dismissal was upheld by the Ninth Circuit Court of Appeal on May 2, 1983.)

The cause of action with which the plaintiff hopes to proceed in this action seeks damages for inverse condemnation under the California Constitution. Inverse condemnation theory requires compensation of an owner whose private property has been "taken or damaged for public use." (Cal. Const., art. I, § 19; *Bauer* v. *County of Ventura* (1955) 45 Cal.2d 276, 282-283; *Tilem* v. *City of Los Angeles* (1983) 142 Cal.App.3d 694, 701-702.) As explained in *Tilem, supra,* at page 702: "The concept of 'taking' has with time changed from the notion of a physical seizure to that of a diminution of the owner's rights

and attributes of ownership . . . . [¶] Accordingly, the rule has developed that a cause of action for inverse condemnation arises from a governmental invasion or appropriation of a valuable property right which directly and specifically affects the landowner to his injury. [Citations.]" There the property owner was compensated in part for loss of the ability to develop a vacant parcel caused by the City's unreasonable precondemnation activity. (*Id.*, at p. 704.) The property right involved there and here for which compensation in inverse condemnation is sought is clearly a right to develop property by building on it and presumably to profit from the development.

Case law had addressed the propriety of inverse condemnation claims based on conduct similar to the City's before the developer filed these actions. *Selby Realty Co.* v. *City of San Buenaventura* (1973) 10 Cal.3d 110, 128, determined that the denial of a building permit did not give rise to a cause of action in inverse condemnation, but that it should be challenged in administrative mandate. When the mandate action and this action were filed, *HFH, Ltd.* v. *Superior Court* (1975) 15 Cal.3d 508, 513-514 had determined that a zoning action which merely reduced the market value of a landowner's property did not give rise to a cause of action in inverse condemnation, although it could be challenged in mandamus. *HFH, Ltd., supra,* left for another day the question whether inverse condemnation recovery was available when the landowner was deprived of substantially all use of his property. (*Id.*, at p. 518, fn. 16.) The answer was provided, of course, by *Agins* v. *City of Tiburon* (1979) 24 Cal.3d 266, 272-277, which determined that, under both the federal and state Constitutions, a property owner's remedy when excessive zoning regulation had deprived him of substantially all reasonable use of his property was not damages for inverse condemnation, but either an action in mandate or for declaratory relief.

RES JUDICATA

The developer contends that the instant action does not involve the same "primary right" at issue in the mandate action. It is aware that res judicata analysis is concerned with determination of primary rights. In *Slater* v. *Blackwood* (1975) 15 Cal.3d 791, an injured nonowner guest in a car had challenged the guest statute which limited recovery against a driver in her first action and lost on appeal. Subsequently in another case, the guest statute was held unconstitutional. (*Id.*, at p. 794.) She then brought a second action, but the court held that the change in the law was no basis for reviving her adjudicated negligence cause of action, because the same primary right had been determined in the first lawsuit and was res judicata, although different legal theories were presented therein. (*Id.*, at pp. 795-796; accord *In re Marriage of Fellers* (1981) 125 Cal.App.3d 254, 257.)

The developer's argument can prevail only if the property right to be compensated by inverse condemnation damages was not involved in the prior mandate proceeding. While the developer is aware that our concern is whether different primary rights are involved in this action compared to the mandamus action, it apparently prefers not to characterize the rights or the difference. On appeal, the developer characterizes the prior action as having involved "the failure of a city to issue use and building permits or grant an extension of a development schedule" or a limited "question of vested rights" or only whether the City abused "its discretion in denying an extension of the development schedule." The developer attempts to contrast those issues with the primary right at issue in this case, which was described in the opening brief as "a vested right for whose taking compensation must be awarded," more particularly, the lost investment involved in overbuilding phase one and anticipating phase two and the lost profits which completion of phase two represented. Challenged by the City's brief to identify the primary right at issue here more specifically, the developer's reply brief char-

acterizes it as the City's depriving the developer of all property rights in its air space above four stories and the use of the steel and elevators constructed for phase two.

We review the pleadings and findings in the prior action to establish what issues were determined. (*Page* v. *Garver* (1907) 5 Cal.App. 383, 386.) As the City points out a taking was alleged in order to justify mandate in the prior petition. The relief sought in the mandate proceeding was to compel the City to alternatively grant building and use permits or at least an extension of three years in the development schedule. Either result would vindicate the developer's right to develop property by building on it and presumably to profit from the development.

The prior appellate opinion shows that a central issue was whether the developer had acquired a vested right to building and use permits. (*Court House Plaza Co.* v. *City of Palo Alto, supra,* 117 Cal.App.3d 871, 884-887.) The trial court's conclusions of law repeatedly rejected the notion that the developer acquired any vested rights (conclusions nos. 3, 10, 12, 13). The developer misstates the record in asserting that the only importance of that contention in the prior action was to determine the scope of administrative review in the trial court. That was one, but not the only, application of its vested rights argument.

In fact, the vested rights doctrine urged in the first action arises in part from the same constitutional provision which is the source of inverse condemnation damages. As explained in *Urban Renewal Agency* v. *California Coastal Zone Conservation Com.* (1975) 15 Cal.3d 577, 583-584: " '[O]ne who in good faith reliance upon a building permit performs substantial work and incurs substantial liability in connection therewith acquires a vested right to complete construction notwithstanding an intervening change in the law that would otherwise preclude construction. [Citations.] The rule is grounded upon the constitutional principle that property may not be taken without due process of law.' " Thus, the same primary right was at issue

in the mandate action which the developer seeks to reassert here, namely a property right to develop property by building on it and presumably to profit from it.

The developer argues that its right to damages was not and could not have been determined in the first action. Its major point is that while the mandate action was pending, such a cause of action did not exist in California law, so that it could not have been in issue. The minor point is that damages are unavailable in a mandate action.[2]

We note that the opinion in *Court House Plaza Co., supra,* 117 Cal.App.3d at pages 887-888 states: "Appellant's final argument sounds in inverse condemnation. While both the federal and state Constitutions provide that private property may not be taken or damaged for public use without payment of just compensation to its owner (Cal. Const., art I, § 19; U.S. Const., 5th Amend.), a 'mere diminution' in property value due to a zoning action is not compensable. (*Agins* v. *City of Tiburon* (1979) 24 Cal.3d 266, 273-274 . . . affd. (1980) 447 U.S. 255 . . . ." The developer argues that this statement is dictum and bad law. The City recognizes that this statement may be dictum, because damages were never in issue in the mandate action. "Whatever may be said in an opinion that is not necessary to a determination of the question involved is to be regarded as mere dictum." (*Ball* v. *Rodgers* (1960) 187 Cal.App.2d 442, 450.) Damages were never prayed for in the petition nor did the trial court reach the issue of the availability of damages for inverse condemnation.

We are unable to determine on the record before us why the prior appellate decision addressed the question of damages for inverse condemnation. No judicial notice has been requested of the briefs on the prior appeal. But res judicata does not only

---

[2]We need not determine whether inverse condemnation damages might be an alternative or additional remedy in a mandate action where a taking was found (see Code Civ. Proc., § 1095; *HFH, Ltd., supra,* 15 Cal.3d 503, 518-520), since no taking was found in the first action, thus eliminating the premise for a damage award.

preclude relitigation of issues already resolved in prior actions; it also bars splitting a single cause of action into two seriatim lawsuits. (*Mattson* v. *City of Costa Mesa* (1980) 106 Cal.App.3d 441, 446, and cases there cited.) "A party cannot by negligence or design withhold issues and litigate them in consecutive actions." (*Safeco Ins. Co.* v. *Tholen* (1981) 117 Cal.App.3d 685, 697.)

Because a cause of action had questionable validity does not mean that it should not have been raised in a prior action, however. As already explained, *Slater, supra,* 15 Cal.3d 791, 796, holds that a change in the law is no basis for avoiding the doctrine of res judicata. Thus, even if *Agins* is no longer the law (a proposition which has been rejected by *Aptos Seascape Corp.* v. *County of Santa Cruz* (1982) 138 Cal.App.3d 484, 493-494, cert. den. ____ U.S. ____, 78 L.Ed.2d 73, after consideration of some of the same authorities cited by developer here), such a change in the law would not revive a primary right previously adjudicated.

Seeking a different form of relief, of course, does not equate with enforcing a different right. In *Wulfjen* v. *Dolton* (1944) 24 Cal.2d 891, 895-896, a plaintiff was not allowed to seek damages based on fraudulent representations when she had been awarded rescission based on the same conduct in an earlier action.

CONCLUSION

The prior action determined implicitly that the City had taken no vested property right from the developer to develop by building on its property. The action is res judicata although the developer originally sought a different form of relief based on this right.

The judgment is affirmed.

/s/

Agliano, J.

WE CONCUR:

/s/

Panelli, P.J.

/s/

Brauer, J.

Court House Plaza Co. v. *City of Palo Alto*
A019076

COPY

Court of Appeal of the State of California

IN AND FOR THE

Sixth Appellate District

FILED

MAY 22 1985

Court of Appeal - Sixth App. Dist.
RICHARD J. CHAIN, Clerk

By _____ DEPUTY

COURT HOUSE PLAZA COMPANY,
Plaintiff and Appellant,

vs.

CITY OF PALO ALTO, et al.,
Defendants and Respondents.

No. A019076

Superior Court No. P33070

BY THE COURT

The Petition for Rehearing is denied.

Dated MAY 22 1985

Panelli P.J.
PANELLI, P.J.

APPENDIX C

(1) Denial of Petition for Rehearing to California Supreme Court

ROBERT E. CARTWRIGHT
CARTWRIGHT, SUCHERMAN, SLOBODIN & FOWLER,
101 CALIFORNIA ST.
26TH FLOOR
SAN FRANCISCO, CA 94111

FLEHR, HOHBACH, TEST
ALBRITTON & HERBERT
1985 AUG -9 AM 9:40
RECEIVED

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

JUL 31 1985

I have this day filed Order _____

REVIEW DENIED

In re: _____ *No.* A019076

COURT HOUSE PLAZA COMPANY

vs.

THE CITY OF PALO ALTO

Respectfully,

Clerk

APPENDIX D

(1) Notice of Appeal to the Supreme Court of the United States

ROBERT E. CARTWRIGHT, ESQ.
CARTWRIGHT, SUCHERMAN, SLOBODIN
& FOWLER, INC.
101 California Street, 26th Floor
San Francisco, California 94111
Telephone: 415/433-0446

Attorneys for Petitioner and Appellant

COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

COURT HOUSE PLAZA COMPANY,	)	No. A019076
	)	
Petitioner and Appellant,	)	NOTICE OF APPEAL OF THE SUPREME COURT OF THE UNITED STATES
	)	
v.	)	
	)	
THE CITY OF PALO ALTO, ET AL.,	)	
	)	
Respondents.	)	

NOTICE IS HEREBY GIVEN that COURT HOUSE PLAZA COMPANY, Petitioner and Appellant above, hereby appeal to the Supreme Court of the United States from the final judgment of the State of California, entered in this action on July 31, 1981, denying a petition for review after decision by the Court of Appeal, Sixth Appellate District.

This appeal is taken pursuant to 28 U.S.C. & 1257(3).

Dated: August 16, 1985

CARTWRIGHT, SUCHERMAN, SLOBODIN
& FOWLER, INC.

By /s/
Robert E. Cartwright
Attorneys for Petitioner
and Appellant

APPENDIX E

(1) United States Constitution, Amendment V

(2) United States Constitution, Amendment XIV, Sections 1 and 5

(3) Ordinance No. 2224

(4) Zoning Code Sections of the City of Palo Alto

UNITED STATES CONSTITUTION
AMENDMENT V

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION
AMENDMENT XIV, SECTIONS 1 and 5

United States Constitution, Amendment XIV, Sections 1 and 5:

Section 1. All persons born or naturalized in the United States, and subject to the jurisidiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Unites States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ORDINANCE NO. 2224

ORDINANCE OF THE CITY OF PALO ALTO AMENDING SECTION 3.02 OF ORDINANCE NO. 1324, THE ZONING ORDINANCE, CHANGING THE ZONING OF CERTAIN PROPERTY KNOWN AS 2655, 2705 AND 2723 BIRCH STREET AND 251, 271, 276, 278, 280 AND 296 SHERIDAN AVENUE FROM R-3:P TO P-C TO ALLOW PROFESSIONAL AND COMMERCIAL OFFICES, AGENCIES AND USES

The Council of the City of Palo Alto does ORDAIN as follows:

SECTION 1. Ordinance No. 1324, the Zoning Ordinance, is hereby amended by amending Section 3.02, the "Zoning Map", by changing the zoning of certain property known as 2655, 2705 and 2723 Birch Street and 251, 271, 276, 278, 280 and 296 Sheridan Avenue from R-3:P to P-C to allow Professional and Commercial Offices, Agencies and Uses.

SECTION 2. A map describing said affected property and the zone change contemplated hereby and a Development Plan under Section 16.07 of the Zoning Ordinance are affixed hereto, marked EXHIBIT A and by reference made a part hereof.

SECTION 3. The Development Plans, Drawing No. 1 entitled "Area Map" dated 9-22-64; Drawing No. 2 entitled "Office Building Floor Plans A" dated 9-22-64; Drawing No. 4 entitled "Elevation" dated 9-24-64; Drawing No. 5R entitled "Parking Garage Floor Plan" dated 11-12-64; Drawing No. 6R entitled "Construction Phasing" dated 11-12-64 are approved with the exception of the portion of the subject property identified as "Lot Area B" known as 2601 Birch Street in accordance with the following conditions:

(1) Development Schedule

(a) Phase 1. Start of construction of the 4-story office building on "Lot Area A," and the parking garage on

"Lot Area C" within two (2) years of Council approval.

(b) Phase 2. Start of construction of the 5th to and including the 10th story on "Lot Area A" and additional levels on the parking garage on "Lot Area C" by October 31, 1976.

(2) Permitted Uses

1. Accountants
2. Advertising Agencies
3. Architects
4. Artists
5. Associations and/or Clubs
6. Attorneys
7. Banks
8. Bookkeeping and Tax Service
9. Collection Agency
10. Commercial Parking Lots and Garages
11. Consultants — management and investments
12. Contractor's offices (exclude yards)
13. Credit Service Agency
14. Dentists
15. Electronics' Representatives
16. Engineers — civil and consulting
17. Engineers — construction office, designing and development, structural office
18. Insurance — general, life, broker
19. Manufacturers' Representatives
20. Physicians and Surgeons
21. Psychologists
22. Publishers — (general office)
23. Real Estate — appraisers, brokers, consultants
24. Research — general offices, marketing, consultants
25. Restaurant

26. Savings and Loan Companies
27. Secretarial Services — light printing
28. Social Clubs
29. Tabulating — statistical
30. Title companies

(3) Structures

Building location, dimensions, heights and other improvements shall be substantially as indicated on the approved Development Plan.

(4) Site

Lot coverage, open area, landscaping and access driveways shall be substantially as indicated on the approved Development Plan.

(5) Off-Street Parking

There shall be one (1) off-street parking space for each one hundred forty-four (144) square feet of net usable floor area of the ground floors and one (1) parking space for each two hundred eighty-eight (288) square feet of net usable floor area on upper floors. Minimum dimension of parking spaces, aisle and access space shall be as provided in Section 4.51 of the Zoning Ordinance, except that the minimum width of each parking space shall be nine (9) feet.

SECTION 4. This ordinance shall become effective upon the expiration of thirty days from its passage.

INTRODUCED: December 14, 1964

PASSED: December 28, 1964

AYES: Arnold, Beahrs, Byxbee, Comstock, Cooley, Dias, Porter, Rodgers, Rohrs, Rus, Woodward, Zweng.

NOES: Debs, Flint.

ABSENT: Cresap.

ATTEST:

/s/ Shirley Kilgore
City Clerk, Acting

APPROVED:

/s/ B. Woodward
Mayor

APPROVED AS TO FORM:

/s/ Robert E. Michalski
City Attorney

APPROVED AS TO CONTENT:
/s/ Louis J. Fourcroy
Planning Department

Change of District for Property at 2655, 2705, and 2723 Birch Street and 251, 271, 276, 278, 280, and 296 Sheridan Avenue - 9-17-64.

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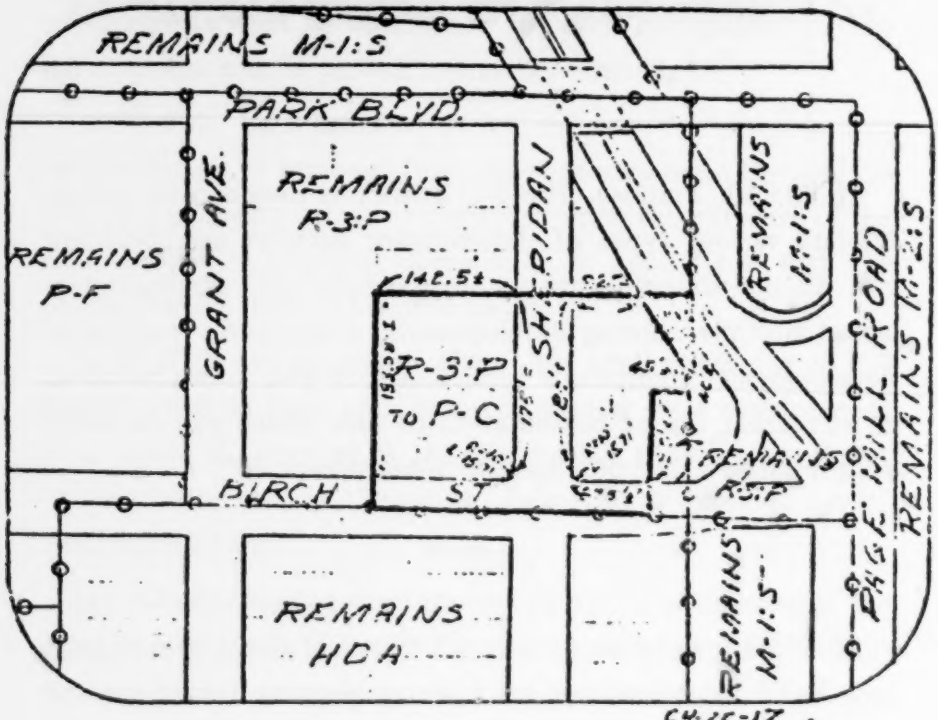

POSTED 100' SCALE ZONE MAP
600 " " "
200 " OFFICIAL MAP
200 " LAND USE MAP

ZONING CODE SECTIONS OF THE CITY OF PALO ALTO

Chapter 18.68
P-C PLANNED COMMUNITY DISTRICT REGULATIONS

*****

18.68.010 Purpose. The P-C district is designed to accommodate various types of development such as neighborhood and district shopping centers, professional and administrative areas, multiple housing developments, single-family residential developments, commercial service centers and industrial parks or any other use or combination of uses which can be made appropriately a part of a planned development.

*****

18.68.030 Uses permitted. All and any uses are permitted in a P-C district provided such use or uses are shown on the development plan for the particular P-C district as approved by the city council. *****

18.68.040 Uses requiring use permits. A use permit shall be required for any and all uses in a P-C district *****. Upon payment of the fee required by Section 18.90.040 for use permits, a use permit shall be issued without a public hearing if the proposed structure or structures comply with the development plan and conditions thereof. The zoning administrator may impose additional conditions and requirements on the use permit as he deems necessary to secure the purposes of this title and the approved development plan. If the applicant is

aggrieved by the action of the zoning administrator through his denial of the use permit or conditions imposed thereon, he may appeal such denial or conditions under the procedures set forth in Chapter 18.92. *****

18.68.050 Height and space requirements. Maximum height and bulk and minimum setback, yard, parking and loading requirements shall be established for each P-C district by the development plan approved by the city council. *****

18.68.060 Establishment of P-C districts. P-C districts may be established or removed from the zone map upon the application of a property owner or owners or upon the initiative of the city council or planning commission in accordance with the procedures set forth in Chapter 18.98. *****

18.68.070 Development plan. An application for a P-C district shall include and be accompanied by a development plan which, if approved by the city council, shall become a part of the zoning map of the city of Palo Alto as provided for by Section 18.08.040.

(a) Changes in the development plan shall be considered the same as changes in the zoning map and shall be made in accordance with the procedures set forth in Chapter 18.98 of this title, except that such change may be accomplished by city council resolution rather than the passage of an ordinance or, when applicable, by the final decision of the director of planning, pursuant to Chapter 18.99 of this title, for administrative approval of minor changes in projects.

(b) The development plan shall include:

(1) A map showing any street systems and lot design proposed within the district. *****

(4) A plot plan for each building site or sites in the proposed P-C district or any portion thereof, as required by the

zoning administrator. ***** The required plot shall show the approximate location of all proposed buildings, indicating maximum and minimum distances between buildings and between buildings and property or building site lines, and shall indicate the general location and type of landscaping. *****

(a) Off-street parking and loading plan.*****

(6) Elevations and/or perspective drawings of all proposed structures *****. Such drawings need not be the result of final architectural decisions and need not be in detail. The purpose of such drawings is to indicate, within stated limits, the height of proposed buildings and the general appearance of the proposed structures to the end that the entire development will have architectural unity.*****

18.68.080 Development schedule. A. An application for a P-C district shall be accompanied by a development schedule indicating to the best of the applicant's knowledge the approximate date on which construction of the project can be expected to begin, the anticipated rate of development and completion date. The development schedule, if approved by the city council, shall become a part of the development plan and shall be adhered to by the owner of the property in the P-C district and his successors in interest.

B. From time to time the zoning administrator shall compare the actual development accomplished in the various P-C districts with the approved development schedules and shall report his findings to the planning commission.

C. If in the opinion of the planning commission the owner or owners of property in P-C districts are failing or have failed to meet the approved development schedule, the commission may initiate proceedings under Chapter 18.98 to remove the P-C district from the zoning map or to amend the development plan.

D. For good cause shown by the property owner in writing, prior to the expiration of the original time schedule for the development, the planning commission, without a public hearing, may recommend a change or extension of the time limits imposed by the development schedule. Upon receipt of the recommendation of the planning commission, the city council may change or extend the time limits imposed by the development schedule. *****

Chapter 18.90
VARIANCES AND USE PERMITS

*****

18.90.050 Public hearing—Time of hearing. Upon the filing of such application, the zoning administrator shall set the matter for public hearing and such hearing shall be within thirty days of the filing of such application. *****

18.90.060 Public hearing—Notice. (a) A notice of such hearing shall be mailed to the applicant, and to each occupant and person to whom is assessed the property within two hundred fifty feet of the exterior limits of the property involved. *****

18.90.070 Public hearing—Decision. At the time and place set for such hearing the zoning administrator shall hear evidence for and against such application, shall make findings and shall take such action as in his opinion is indicated by such evidence. Each hearing shall be open to the public. He may continue from time to time any hearing held by him. A decision shall be rendered by the zoning administrator within ten days after conclusion of the hearing, ***** (Ord. 1521 (part), 1954: Ord. 1324 *****

18.90.090 Grounds for granting variance. A. Granting Variance. The zoning administrator may grant a variance from the area, height, yard and space requirements of this title if, from the application or the facts presented at the public hearing, he finds:

(1) There are exceptional or extraordinary circumstances or conditions applicable to the property involved that do not apply generally to property in the same district; and

(2) The granting of the application is necessary for the preservation and enjoyment of a substantial property right of the applicant and to prevent unreasonable property loss or unnecessary hardship and will not be detrimental nor injurious to the property or improvements of other owners of property; and

(3) The granting of the application will not be detrimental to the public welfare or convenience.

In granting such variance the zoning administrator may impose such reasonable conditions or restrictions as he deems appropriate or necessary to protect the public health, safety or welfare.

B. Variance from Setback Ordinance. The zoning administrator may grant a variance from the requirements of the setback ordinance, if facts presented in the application or at the public hearing support both paragraphs (2) and (3) of subsection A of this section. (Ord. 1914 (part), 1960: Ord. 1521 (part), 1954: Ord. 1324 § 23.09, 1951).

18.90.120 Revocation—Extension. *****

A use permit or a variance which has not been used within one year after the date of granting thereof becomes null and void and of no effect unless specifically issued for a longer time period. The zoning administrator may, without a hearing, extend such time for an additional year only upon application filed with him before the expiration of the first year. *****

Chapter 18.92
APPEALS

*****

18.92.010 Appeal. An appeal may be taken to the planning commission by any person, firm or corporation aggrieved or affected by any determination of the zoning administrator. *****

18.92.020 Filing—Procedure. An appeal shall be in writing and filed in duplicate with the city clerk within ten days after the mailing of notice of the decision of the zoning administrator. *****

18.92.030 Hearing date—Notice. Upon receipt of the appeal, the city clerk shall set the appeal for hearing at a meeting of the planning commission to be held for such purpose not more than four months thereafter. Notice of such hearing shall be given in the same manner as provided in Chapter 18.90 for notice of hearing by the zoning administrator. *****

18.92.040 Stay of proceedings. Filing of an appeal shall stay all proceedings in furtherance of the action appealed from until the determination of the appeal as provided herein. *****

18.92.050 Hearing on appeal. Upon the date set therefor the planning commission shall hold a public hearing of the appeal unless, for cause, the commission shall on that date continue the matter. Upon the hearing of such appeal the commission shall hear evidence, make findings and recommend to the city council that the decision appealed from be affirmed, changed or modified, or in lieu thereof, make such other or additional recommendations as it shall deem proper in the premises, subject to the same limitations as are placed on the zoning administrator by this title. *****

18.92.060 Recommendation to city council. The findings of the planning commission shall be submitted in the form of a recommendation to the council and placed on the agenda of the next regular council meeting by the city clerk. *****

18.92.070 Action by city council. Upon the receipt of the recommendation of the planning commission the city council may, if it so desires, hold a public hearing of the matter in the same manner as provided for public hearings by the zoning administrator, or may consider the appeal without a hearing. In conformity with the provisions of this title, the council may by motion reverse or affirm wholly or partly, or may modify any decision, determination or requirement of the commission and may make such decision or determination or may impose such conditions as the facts warrant, and its decision or determination shall be final. *****

Chapter 18.98
AMENDMENTS, ALTERATIONS, CHANGES IN DISTRICTS

*****

18.98.010 Conditions requiring zone changes. This title may be amended by changing the boundaries of districts or by changing any other provision thereof whenever the public interest, health, safety, morals, peace, comfort, convenience or general welfare may so require. *****

18.98.020 Manner of initiating. Changes in the district boundaries may be initiated as follows:

(a) By motion of the city council on its own initiative;

(b) By motion of the planning commission on its own initiative; or

(c) By application of a property owner. *****

18.98.030 Application by property owner. An application for a change of district may be made by a record owner of the parcel of property for which a change is sought or by a purchaser thereof under a contract in writing duly executed and acknowledged by both the buyer and the seller, by a lessee in possession thereof, with the written consent of the owner of record of the legal title to make such application, or by the agent of any of the foregoing, duly authorized in writing. The application must be in writing on a form supplied by the division of planning. *****

18.98.060 Notice of public hearing. The planning commission shall give notice of the time and place of such hearing and the purpose thereof *****

18.98.070 Public hearing. ***

The recommendation of the commission to the council shall be in writing and shall set forth fully the findings and determinations of the commission on the matter involved. A decision shall be rendered within a reasonable time and a recommendation shall be filed with the council within seven days after the decision is rendered by the planning commission. *****

18.98.080 Powers of the city council upon recommendation. Upon receipt of the recommendation of the planning commission as provided herein, the city council shall consider the same and may change or refuse to change the classification of any property as requested or recommended and its decision thereon shall be final and conclusive. If the city council so desires it may hold a public hearing on the matter in the same manner as provided in Section 18.98.070 hereof where applicable. If the classification of any property is to be changed an ordinance shall accordingly be passed and thereupon the zoning administrator shall change the official zoning map in conformity therewith. *****

18.98.090 Initiative of the city council or the planning commission. The city council may, be a minute order, request the planning commission to consider any property; or the planning commission may, of its own initiative, consider such a change. In either case the planning commission shall proceed as though an application for change had been filed with the planning department as provided in Section 18.98.030 hereof. *****

Chapter 18.99
ADMINISTRATIVE APPROVAL OF MINOR CHANGES IN PROJECTS

*****

18.99.010 Purpose of chapter. The purpose of this chapter is to provide a uniform and orderly procedure for expeditious administrative approval of minor changes to existing projects and plans. (Ord. 2927 § 1 (part), 1976.)

18.99.020 Definition of minor change. "Minor change" means an alteration or modification of an existing plan, development or project which is inferior in bulk, degree, or importance to the overall dimension and design of the plan, development, or project, with no change proposed for the use of the land in question, no change proposed in the character of the structure or structures involved, and no exception or variance required. (Ord. 2927 § 1 (part), 1976.)

18.99.030 Applicability of chapter. (a) Type of applications. This chapter shall apply to applications for a minor change to the following:

(1) An approved development plan for a planned community district pursuant to Chapter 18.68 of this title; *****

APPENDIX F

(1) Inter-office Communication of the City of Palo Alto of February 3, 1979

(2) Letter of City of Palo Alto of May 23, 1968, by Donald G. Meaney, Assistant City Attorney

CITY OF PALO ALTO
INTER-OFFICE COMMUNICATION

To: City Manager Date: February 3, 1970

From: Sr. Assistant City Attorney Department:

SUBJECT: California Lands Building
260 Sheridan Avenue

Please find attached a copy of a letter which is being sent to Mr. Dunn concerning the smokeshaft problem regarding the above reference property. Mr. Dunn, his architect, Mr. Hoover, and his attorney, Mr. Cliff, have agreed to those conditions.

As you know, this rulling comes from this office on the basis that Ordinance 2224 contemplated the 10 story building with an interior smokeshaft and the development plan attached to the ordinance specifically shows a 10 story building with no exterior smokeshaft. This understanding was confirmed by Mr. Keithley's letter of June 4, 1965. Therefore, it would appear that certain rights vested. Those rights are with respect to a building with an interior smokeshaft, which building is unsprinklered. It should be noted here that henceforth all P-C ordinances, most particularly those which contemplate development in phases, will include language similar to or identical with the following:

> "All construction under this ordinance shall be in accordance with applicable building and fire codes in effect at the time that the building permit for each phase of building is issued."

We are confident that this language would eliminate any future problems of a similar nature.

PETER G. STONE

PGS.rb
cc: Chief Building Official
Assistant Building Official
Assistant Fire Chief
Fire Marshal

Office of the City Attorney May 23, 1968

Mr. W. G. Dunn
California Lands Investment Company
430 Cambridge Avenue
Palo Alto, California

Re: City of Palo Alto Resolution No. 4113
(P-C Development for Property Known as
260 Sheridan Avenue - Palo Alto).

Dear Mr. Dunn:

In answer to the question from your lender, the offset of violation of the Development Schedule in the P-C plan, as amended by Resolution No. 4113, simply means that the Development Plan would become defunct and that before any construction is undertaken, application must be made for an amendment extending the Development Schedule.

Thus, in the sense that compliance with the Development Plan is necessary to avoid its lapse, construction of the permanent structure must start on or before October 21, 1976. However, this does not mean that the City of Palo Alto has any right, either under its own municipal code or under State law, to require specific performance on the developer in the form of construction of the building, or to sue for damages.

The lapse of the Development Plan can be prevented by applying for an extension of the Development Schedule if necessary. While this letter should not and cannot be construed as a commitment on the part of the City of Palo Alto to grant such further extensions, inasmuch as this authority is vested in the City Council, these extensions have, in fact, customarily been granted. The reason for this is simply that the City is not any more interested than the owners in having a development remain half completed.

The date in the Resolution coincides with the date for commencement of construction of the rest of the stories of the office building itself. Thus, the only real and practical effect of failure to start building the parking structure according to the Development Schedule in Resolution No. 4113 is to cause the *entire second phase portion* of the Development Plan to lapse,

so that if any more construction is undertaken, it would be after a new Development Schedule of both buildings satisfactory to the City.

Very truly yours,
JAMES A. HILDEBRAND
City Attorney

BY DONALD G. MEANEY
Assistant City Attorney

BSM:km

cc: Planning Officer
City of Palo Alto

Supreme Court, U.S.
FILED
OCT 8 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-287

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

COURT HOUSE PLAZA COMPANY, a limited partnership,
Petitioner,

VS.

THE CITY OF PALO ALTO,
a municipal corporation, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA

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BEST AVAILABLE COPY

44 pp

QUESTION PRESENTED

Whether California law of *res judicata* precludes the present action for inverse condemnation damages under the California Constitution by reason of a final judgment on the merits against petitioner and in favor of respondents in a prior state court action which adjudicated the same facts, same cause of action and same constitutional provision and held that there was no inverse condemnation?

No question of federal law is presented.

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No. 85-287

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

COURT HOUSE PLAZA COMPANY, a limited partnership,
Petitioner,

VS.

THE CITY OF PALO ALTO,
a municipal corporation, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA

STATEMENT OF THE CASE

A. INTRODUCTION

Petitioner is seeking review in this Court for the third time in this lengthy, eight year, vexatious litigation against the same respondents. On the two previous occasions, this Court denied review. A brief recapitulation of the history of this litigation will demonstrate the frivolity of this third petition, and the absence of any issue that would permit this Court to take jurisdiction of this case.

Briefly, the facts pertinent to this proceeding are as follows.[1]

[1] Petitioner's Statement of the Case (Petition ("Pet.") pp. 2-5) fails to give a complete picture of the case because, on its face, it is limited to the facts alleged in the complaint in the present action (*"CHP II"*). The

In 1964, respondent City of Palo Alto, at petitioner's request, zoned petitioner's property for construction of an office building and garage in two phases. The zoning ordinance required that construction of Phase 1 (4-story office building and garage) be started by 1966, and that Phase 2 (6 more floors on the same office building) be started by 1976. Nothing in the ordinance stated that completion of Phase 1 vested any right to complete Phase 2. App. A, p. A-15, CL 3. The *CHP I* trial court found that the Phase 1 4-story building was

> "a self-contained, functional structure even without the additional six floors, and *has been occupied and used up to and including the present.*" (Emphasis added)

App. A, FF 13.

The trial court also found that petitioner "did not acquire vested rights to construct Phase 2 by virtue of overbuilding Phase I to accommodate it or in any other respect". App. A. FF 61, CL 12.[2] As to Phase 2, the court found that petitioner fully obligated itself to pay for Phase 2 costs before obtaining financing or a

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incompleteness is inconsistent with Rule 21.1(g) requiring the Petition to contain "facts material to the consideration of the question presented".

At this point, in compliance with Rule 34.1(g) requirements that respondents' statement of the case contain "all that is material to the consideration of the questions presented with appropriate references to . . . the record . . .", and pursuant to Rule 201 of the Federal Rules of Evidence, respondents respectfully request this Court to take judicial notice of the Appendices to this brief which contain copies of records of proceedings before the various courts that have considered and litigated this action and related state court actions referred to throughout this brief.

Appendix A to this brief sets forth detailed Findings of Fact ("FF") and Conclusions of Law ("CL") by the trial court in the first state court action between the same parties on the same cause of action. That action is called *"CHP I"* in this brief. The Findings and conclusions followed a 5-week trial in which respondents prevailed over petitioner.

[2] The Court of Appeal below also confirmed that the *CHP I* trial court "repeatedly rejected the notion that the developer acquired any vested rights" (Pet., App. B, p. B6), and that "no taking was found in the first

building permit therefor; and that this mistake, not any act of respondents, resulted in petitioner's financial problems. App. A, FF 20-23. There was no evidence of an anti-high rise philosophy on the part of respondents nor any intent to delay or obstruct petitioner. App. A., FF 23, 24, 32-37, 59-63, CL 15. As to respondents' refusal to extend the 1976 deadline for start of Phase 2, the trial court concluded that petitioner

> "... had not at any time acquired vested rights to a building permit to construct Phase 2; therefore, the (City's) denial of the one-year extension did not constitute a deprivation of vested rights."

App. A, CL 13.

Thus, *CHP I* clearly settled that petitioner had no reasonable, investment-backed expectation in Phase 2; that the City had not interfered with petitioner's property rights; and that petitioner has an economically viable use of the property. *Agins v. City of Tiburon*, 447 U.S. 255 (1979); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 138 (1978).

In *CHP I*, petitioner first sought mandamus against respondent City of Palo Alto in California Superior Court, contending, inter alia, that its property had been taken in inverse condemnation under both the California and federal constitutions. The Superior Court denied relief; the California Court of Appeal affirmed; and the California Supreme Court denied review. Petitioner then sought federal review of the judgment of the Court of Appeal, but this Court denied certiorari. *Court House Plaza Co. v. City of Palo Alto*, 117 Cal. App. 3d 871 (1981), *treating appeal as pet. for certiorari, cert. den.*, 454 U.S. 1074 (1981).

Petitioner then brought a damage action in federal District Court, again contending that its property had been taken in inverse condemnation. The District Court found that the inverse condemnation claim had already been adjudicated adversely to petitioner in *CHP I*, and held the claim barred by *res judicata* under 28 U.S.C. section 1738 (and hence by *res judicata* under

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action, thus eliminating the premise for a damage award" (*Id.*, p. B7, fn. 2, and p. B8 (Conclusion)).

California law). The Court of Appeal for the Ninth Circuit affirmed in a one-sentence unpublished memorandum opinion. Petitioner sought review of the Ninth Circuit's decision, but this Court denied certiorari. *Court House Plaza Co. v. City of Palo Alto*, 464 U.S. 935 (1983). Petitioner refers to this suit as *CHP III*, and respondents adopt this nomenclature.

Three months after filing its damage action in federal District Court in *CHP III* petitioner filed an amended complaint for damages in California Superior Court, contending once again that its property had been taken in inverse condemnation. Petitioner refers to this suit as *CHP II*, and respondents adopt this nomenclature. The complaint in *CHP II* was identical to the complaint in *CHP III*. As the federal District Court in *CHP III* had done, the California Superior Court in *CHP II* found that the claim was barred by *res judicata* under California law because of the decision in *CHP I*. The California Court of Appeal below affirmed. Petitioner seeks review in this Court of the Court of Appeal Decision.

Petitioner, now petitioning this Court for the third time, contends that this case presents a substantive federal issue concerning the availability of damages in an inverse condemnation suit. As is apparent from the preceding summary and as will be explained in greater detail below, that issue is not present in this case. The only issue is one of California law—whether the California Court of Appeal correctly applied the California law of *res judicata*. This Court does not have jurisdiction to decide questions of state law when reviewing decisions of a state court.

B. Nature and Procedural History of the Present Action and Two Prior Related Actions

To fully appreciate that the present petition is limited to the *res judicata* issue, it is necessary to describe the present action and two prior related actions between the same parties on the same cause of action (i.e., *CHP I, II* and *III*).

1. ***Petitioner's First State Court Action ("CHP I"):*** **This Court Has Previously Denied Review of a State Court Final Judgment on the Merits, Against Petitioner and In Favor of Respondents, Following a 5-Week Trial Which Litigated the Same State Constitutional Claim and Predicate Facts Asserting Injury to Property as Are Alleged Herein.**

Petitioner originally brought an action in California state court in 1977 challenging respondents' legislative zoning decision denying permission to build six additional stories on a fully functioning, occupied four-story building. Petitioner alleged a breach of both state and federal constitutional rights, including an unconstitutional taking of property, and sought mandamus based on those claims.[3] Following full discovery and a 5-week trial, the trial court found that none of petitioner's constitutional rights had been violated.[4] The California Court of Appeal affirmed, concluding that there had been no taking of petitioner's property. *Court House Plaza Co. v. City of Palo Alto (CHP I)*, 117 Cal. App. 3d 871, 887-888 (1981). The California Supreme Court denied petitioner's petition for hearing. *CHP I*, 117 Cal. App. 3d at 888.[5]

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[3] The state constitutional taking or inverse condemnation claim was raised in paragraph 92 of the 61-page petition for writ of mandate in *CHP I*. (That petition is found at pages 113-174 of the Clerk's Transcript before the Court of Appeal below; and paragraph 92 is found at CT 170.) Paragraph 92 reads in pertinent part: " . . . Respondents have denied Petitioner the lawful use of its real property, *have taken the same without compensation . . . and in contravention of . . . the Constitution of the State of California* and the United States of America . . . ". The same taking claim is raised in the present action. Pet., App. A, p. A13, "Second Cause of Action", paragraph 27.

[4] Appendix A to this brief contains separately numbered "Findings of Fact and Conclusions of Law" of the state trial court in *CHP I*. They were also presented to and considered by both the trial court and the Court of Appeal below through judicial notice.

[5] *CHP I* resulted in a final judgment on the merits. Petitioner has never contended otherwise.

Petitioner then filed a Jurisdictional Statement in this Court seeking review of that judgment. Referring directly to its factual and constitutional taking claim that had been litigated adversely to it in all state courts in *CHP I*, petitioner contended:

> "The present case clearly presents the issue of whether California under the recent ruling in *Agins v. City of Tiburon*, 24 Cal. 3d 266 (1979) that a property owner's exclusive remedy is invalidation of the zoning regulation where the zoning regulation deprives the property owner of substantially all beneficial use of the real property right and is not entitled to an award of damages in an inverse condemnation proceeding . . . can deny [petitioner] any monetary compensation . . . ".

CHP I, No. 81-404, Jurisdictional Statement, pp. 11 and 13.[6] This passage frames the precise issue which Petitioner again seeks to revive in the present petition. Pet., Issues I and II, pp. 6-15.

However, this Court dismissed the appeal and, treating it as a petition for certiorari, denied the petition. *CHP I*, 454 U.S. 1074 (1981).

2. ***Petitioner's Federal Action ("CHP III")*: This Court Again Denied Certiorari After The Ninth Circuit Court of Appeals Affirmed Dismissal on Grounds of *Res Judicata* of Petitioner's Damage Action Alleging Identical Constitutional Taking Claims and Predicate Facts as *CHP I*.**

Three days after this Court denied certiorari in *CHP I*, Petitioner filed on December 3, 1981, an action in United States District Court seeking damages for violation of the identical

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[6] Petitioner also contended therein:

> "*The present case presents a factual situation which gives the Supreme Court jurisdiction to decide the monetary issue where the* Property *Owner has been foreclosed from any use of the rights to six additional stories* of a ten-story office building *by challenged zoning regulations and also has been foreclosed from monetary compensation.*" (Emphasis added) *CHP I*, No. 81-404, Jurisdictional Statement pp. 25-26.

federal and state consitutional taking provisions, based on the same underlying facts, as it alleged in *CHP I* (*"CHP III"*).[7]

On June 4, 1982, the District Court dismissed *CHP III* holding:

> "Because plaintiff's action is precluded by the *res judicata* effect of a prior judgment in state court [i.e., *CHP I*], plaintiff's action must be dismissed . . .
>
> "The federal claims here are based on the same alleged wrongful acts which formed the basis of plaintiff's state court mandamus action . . .
>
> "[T]he alleged violations of the federal constitution have been adjudicated in state court. The state court of appeal upheld the trial court's findings that the denial of the time extension [to build the six story addition] did not deprive plaintiff of equal protection or due process of law, *Court House Plaza v. City of Palo Alto*, 117 Cal. App. 3d at 883, *and the city's adverse zoning action did not constitute a 'taking' requiring compensation.* Id. at 888." (emphasis added)

App. B.

A three-judge panel of the Court of Appeals for the Ninth Circuit unanimously affirmed the District Court's dismissal, on *res judicata* grounds, in a one sentence unpublished memorandum order on May 2, 1983. App. C. The Court of Appeals judgment is reported at 709 F. 2d 1515.[8]

Acting for the second time, this Court again denied a petition for writ of certiorari. 464 U.S. 935 (1983).

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[7] As a practical and sequential matter, this federal action followed next on the heels of *CHP I*. However, petitioner has referred to the federal action as *CHP III* in its petition (p. 5). Therefore, to avoid confusion, that designation will be used herein.

[8] The Court of Appeal below in the present action took judicial notice of the dismissal of *CHP III* because of the *res judicata* effect of *CHP I*. Pet., App. B, p. B3.

3. *Petitioner's Second State Court Action ("CHP II"):* The Trial Court Below Dismissed As *Res Judicata* The Present State Constitutional Taking Claim and Action, Which Is A Mirror Image of *CHP III*, and the Court of Appeal Below Affirmed.

On February 26, 1982, three months after this Court denied certiorari in *CHP I*, petitioner filed the present *CHP II* complaint seeking damages against the same defendants named in *CHP I* and *III*. *CHP II* is a verbatim copy of the *CHP III* complaint. Petitioner later reserved its federal claims, so that the court below had only a state claim before it.[9] Pet., App. A, p. A20. (CHP had not reserved any claims in *CHP I*.) However, as conceded by petitioner in its reservation, *CHP III*

> "states claims for relief that are in substance identical to the causes of action in the First Amended Complaint before this Court."(CT 280)

(The takings clauses of the United States and California Constitutions are virtually identical.)

The Court of Appeal below, commenting on the allegations of the *CHP II* amended complaint, emphasized that "[n]umerous allegations in the . . . complaint contradict the findings made in [*CHP I*]"[10]; that the trial court below had judicially noticed the *CHP I* mandamus petition, detailed findings and appellate opinion; and that, therefore, "[o]n demurrer, the court is not required to assume the truth of allegations which contradict what is judicially noticed". Pet., App. B, pp. B1-B2. The Court of Appeal also noted petitioner's concession that the facts in *CHP I* and *CHP II* were the same. *Id.*, p. B1.

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[9] Respondents filed a demurrer and motion to strike the first amended complaint in *CHP II*. Pet., App. A, pp. A18-19. Attached to their Memorandum of Points and Authorities in Support thereof were Exhibits A-K. See App. D to this brief, consisting only of the title page and page 1b listing those exhibits. Exhibits C-K are essentially the same exhibits that respondents presented to the federal District Court for judicial notice in connection with its motion to dismiss in *CHP III*.

[10] Those *CHP I* findings are set forth in Appendix A to this brief.

The trial court below took judicial notice of the holding of the Court of Appeal in *CHP I* "in which the court [of appeal] held that plaintiff was not entitled to compensable damages under a theory of inverse condemnation. Such damages would include any that flow from interference with use of air space." Pet. App. A, p. A21. It concluded that petitioner's claim was barred by *CHP I*:

> "[T]he demurrer to the second cause of action [state inverse condemnation] is sustained on the grounds that that cause of action is barred by *res judicata*. Since there is no basis for an amendment, the demurrer is sustained without leave to amend."

Ibid.[11]

The Court of Appeal below addressed and decided only the *res judicata* issue. As the Court noted at the outset: "The critical question in this appeal is: does that judgment [*CHP I*] bar the developer from seeking damages in inverse condemnation based on the same actions by the City? The trial court so decided . . . We agree with the [trial] court's decision." Pet., App. B, p. B1. Thus, the Petition is erroneous in stating that the Court of Appeal "concluded under *Agins v. City of Tiburon*, 24 Cal. 3d 266, 272-277 (1979), affd. on other grounds, 447 U.S. 255 (1980)" that the appropriate remedy for a taking by excessive zoning regulations is not money damages but equitable relief. Pet., p. 5.

As is evident from the face of the opinion, the Court of Appeal's discussion of inverse condemnation was merely a historical preface to its holding on the single *res judicata* issue before it. Pet., App. B, pp. B3-B4. More specifically, the Court of Appeal, in that portion of the opinion, was simply explaining, for *res judicata* purposes, the nature of the cause of action or, in California *res judicata* terms, the primary right at issue in *CHP I*

---

[11] The petition misstates the trial court's decision in that it indicates that the court held that petitioner "was not entitled to . . . damages under . . . inverse condemnation . . . *and* that *CHP II* was barred by *res judicata*." (Emphasis added.) Pet., p. 5. In fact, the trial court held that petitioner was not entitled to inverse condemnation damages *because CHP II* was barred by *res judicata*. Pet., App. A, p. A21.

and *II*, preliminary to its single holding that it was identical in both actions and that, therefore, preclusion applied. The Court of Appeal noted that the property right involved in *CHP I* was "clearly a right to develop property by building on it and presumably to profit . . . ". Pet, App. B, p. B4. It then went on to explain briefly the state of the law when *CHP I* and *II* were filed. *Ibid.* Thereafter, the body of the opinion, entitled "Res Judicata", points out that "[t]he developer's argument [that *CHP II* does not involve the same primary right as *CHP I*] can prevail only if the property right to be compensated by inverse condemnation damages was not involved in [*CHP I*]". *Id.*, p. B5. The Court of Appeal carefully examined what was actually litigated in *CHP I*; and, comparing it to *CHP II*, noted petitioner's reluctance to do so. The court then emphasized that petitioner had alleged a taking in *CHP I*, that the *CHP I* "apellate opinion shows that a central issue was whether the developer had acquired a vested right" and that the *CHP I* trial court "repeatedly rejected the notion that the developer had acquired any vested rights . . . ". *Id.*, p. B6. The Court of Appeal concluded: "Thus, the same primary right was at issue in [*CHP I*] which the developer seeks to reassert here . . . ". *Id*,. pp. B6-B7.

Thus, the entire petition evaporates in the face of the foregoing review of what was actually decided by the Court of Appeal below.

In sum, petitioner litigated and lost all of its federal and state constitutional claims (and their factual predicates) in *CHP I*. It has tried to relitigate those same federal constitutional claims and facts in federal court, and all federal courts found that they had already been adjudicated and are therefore barred by *res judicata*. *CHP III*. It has tried to relitigate the same state constitutional claims and facts in state court, and the state trial court and Court of Appeal below have found that they had already been adjudicated and are therefore barred by *res judicata*. *CHP II*.

Now, for the third time, petitioner importunes this Court to review its taking and vested rights claims on the previously rejected ground that this Court should address issues on inverse condemnation law not presented to the California courts earlier. Petition, Issues I and II. But every court that has so far consid-

ered the matter has concluded that the record clearly demonstrates that petitioner's taking claim and pertinent facts were actually presented to the state court in *CHP I* and adjudicated adversely to petitioner by that court. Thus, the only question this petition fairly presents is whether the Court of Appeal correctly applied California law of *res judicata*.

SUMMARY OF ARGUMENT

I. It is fundamental law that this Court does not have jurisdiction to decide questions of state law when reviewing decisions of state courts. *Murdock v. City of Memphis*, 20 Wall. (87 U.S.) 590 (1875). 28 U.S.C. section 1257 limits this Court's authority to review only those state court decisions which raise issues of federal law.

II. There is no question of federal law presented in this case. In holding petitioner's claim to be barred by *res judicata*, the Court of Appeal below relied entirely on California law. Petitioner does not dispute this fact. Moreover, petitioner does not and could not dispute that the only substantive claim it pursued in this case was an issue of California law.

ARGUMENT

I. The United States Supreme Court Has No Jurisdiction to Decide Questions of State Law When Reviewing Decisions of State Courts.

It is fundamental law that this Court does not have jurisdiction to decide questions of state law when reviewing decisions of state courts. *Murdock v. City of Memphis*, 20 Wall. (87 U.S.) 590 (1875). The statute authorizing Supreme Court appellate review of state court decisions only authorizes this Court to decide issues of federal law. 28 U.S.C. section 1257.

II. There Is No Question of Federal Law Presented in This Case.

There is an immediately evident and fatal flaw in the petition which belies its asserted presence of a federal question that might justify review of this matter by this Court (aside from this Court's

previous denial of review in *CHP III* which involved essentially the same issue as this petition). At no point does petitioner deny (nor, indeed, could it fairly do so) that the cause of action (or, in California *res judicata* terms, the primary right) involved in *CHP II* is identical to that involved in *CHP I*. The Court of Appeal below keenly and appropriately pinpointed this flaw: "While the developer is aware that our concern is whether different primary rights are involved in this action compared to [CHP I], it apparently prefers not to characterize the rights or the difference." Pet., App. B, p. B5.

A related fatal flaw is petitioner's failure to dispute (again it could not fairly do so) that the Court of Appeal below correctly stated and followed California law as to *res judicata*.[12]

These flaws are fatal because they impliedly concede that petitioner's asserted reason for granting the writ (i.e., to address the issue of the remedy for a taking) is a mirage.

Moreover, the record in this case is not appropriate to raise the issue of the correct remedy for a taking precisely because *CHP I* comclusively determined that no taking had occurred as noted by the Court of Appeal below. Pet. App. B, p. B7, fn. 2, and p. B8 (Conclusion). As this Court has held: "Because no taking has occurred, we need not consider whether a State may limit the remedies available to a person whose land has been taken without just compensation." *Agins v. City of Tiburon*, 447 U.S. 255, 263

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[12] Under settled California law, cited and relied on by the Court of Appeal (Pet., App. B, pp. B5-B8)

> "[a] valid final judgment on the merits in favor of a defendant serves as a complete bar to further litigation on the same cause of action."

Slater v. Blackwood (1975) 15 Cal. 3d 791, 795. For *res judicata* purposes, California courts hold that

> "the violation of a single primary right constitutes a single cause of action . . . ".

Boccardo v. Safeway Stores, Inc., (1982) 134 Cal. App. 3d 1037, 1043; *Wulfjen v. Dolton* (1944) 24 Cal. 2d 891, 895. According to *Slater*, a

> " 'cause of action' is based upon the harm suffered, as opposed to the particular theory asserted . . . ".

Slater, supra, 15 Cal. 3d 794, 795.

(1979). Thus, it is irrevelant whether, as petitioner contends, a damage remedy did not exist for a taking when *CHP I* was pending. Pet., pp. 13-14.

Finally, it is spurious and trifling for petitioner to assert the damage remedy as an issue herein in the face of this Court's prior denial of review of the identical issue in the *CHP I* petition for certiorari in this Court. 454 U.S. 1074 (1981). (See Statement of the Case, *supra,* Part B.1, p. 6)

A. The California Court of Appeal Held Petitioner's Claim to Be Barred by the California Law of Res Judicata.

The California Court of Appeal, whose decision petitioner is challenging, held that petitioner's substantive claim was barred by *res judicata*. In so holding, the Court of Appeal relied entirely on California law. Pet., App. B, pp. B1-B8. Petitioner does not deny this fact.

No argument has been made that the application of settled principles of California *res judicata* law deprived petitioner of due process of law under the United States Constitution. In a vague and confusing statement, the petition appears to suggest that this Court should accept review to determine whether there is, as an abstract proposition, a due process right to damages for an inverse condemnation deprivation of vested rights to avoid an assertedly unjust application of *res judicata* in this case. This statement hopelessly and erroneously intermixes the due process and taking clause concepts. Whatever the statement is intended to mean, there are three reasons for rejecting its suggestion. First, petitioner raised a federal due process issue in *CHP I* (See paragraph 92 of the *CHP I* petition for writ of mandate at p. 170 of the Clerk's Transcript before the Court of Appeal below. Paragraph 92 also raised the taking issue under both federal and state constitutions. See fn. 3, supra.) As noted by the federal District Court in *CHP III* (App. B, p. A-19), the trial court and Court of Appeal in *CHP I* rejected the argument that the same acts of respondents which petitioner contends were a deprivation of vested rights for taking purposes resulted in a violation of due process. *Court House Plaza v. City of Palo Alto*, supra, 117 Cal. App. 3d 871, 883. Second, petitioner waived any possible right to

raise the suggestion in this case by failing to do so in its petition for writ of certiorari in *CHP III*. Third, the question of whether the application of California law of *res judicata* violated any of petitioner's federal rights "was not raised below, and hence is not open here". *Ellis v. Dixon*, 349 U.S. 458, 460 (1954).

B. The Single Substantive Claim in This Suit Was Based on State Law.

As described in the Statement of the Case, petitioner sought to litigate its federal claim for damages arising out of the asserted inverse condemnation in federal District Court in *CHP III*. In the present suit, brought in California Superior Court, petitioner "reserved" its federal claims so that they could be litigated in the federal District Court.[13] The only substantive claim ever presented to the California court in this suit was a claim for inverse condemnation under California law. Thus, even if the *res judicata* question could be put aside and this Court could legitimately be asked to address the issue of substantive law sought to be litigated in this case, that issue is only an issue of California law.

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[13] As described in the Statement of the Case, the District Court in *CHP III* found that these federal claims were barred by the California law of *res judicata*, as applied by the federal courts under 28 U.S.C. section 1738. If any such indication were needed, this federal decision indicates that the California courts in this case have fairly applied their own law of *res judicata*.

CONCLUSION

For over 8 years now, respondents have been put through extraordinary and unreasonable hoops by vexatious litigation and attempted relitigation of petitioner's legally insufficient claims. This Court has twice refused review. All state courts and all federal courts considering this case have uniformly rejected petitioner's claims. Petitioner now seeks to have this Court review the California Court of Appeal's decision resting entirely on California law. For the reasons and on the authorities set forth above, respondents respectfully request that this Court deny the petition.

DATED: Sept. 17, 1985

DIANE M. LEE
City Attorney

Fred Caploe*
A Professional Corporation

By FRED CAPLOE
Counsel of Record
Attorneys for Respondents

(Appendices follow)

Appendix A

(ENDORSED)
FILED
OCT. 10 1978
JOHN KAZUBOWSKI
COUNTY CLERK

COURT HOUSE PLAZA COMPANY,
a limited partnership,
Petitioner,

vs.

No. P 32449

THE CITY OF PALO ALTO, a municipal corporation, et al.,
Respondents.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A petition for writ of mandamus has been filed herein by Petitioner. Respondents filed a timely return and the matter came on regularly before this Court for trial on Feburary 21, 1978, and succeeding dates. The record of the administrative proceedings was received into evidence, examined and considered by the Court and additional evidence, both oral and documentary, was admitted, examined and considered by the Court. Trial briefs and post-trial briefs have been filed by both parties and examined and considered by the Court. Both parties have orally argued the matter to the Court on March 30, 1978.

Following its examination and consideration of all of the foregoing matters, the Court rendered and filed its Memo of Decision on May 11, 1978.

Petitioner thereafter filed its request for findings of fact and conclusions of law, and the Court filed its order directing Respondents to prepare proposed findings of fact and conclu-

sions of law and a proposed judgment.

The Court hereby makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Petitioner, Courthouse Plaza Company, a limited partnership, was and is the owner of the four-story office building located at 260 Sheridan Avenue, Palo Alto, California. The four-story building is in a block bounded by Sheridan Avenue on the east, Birch Street on the south, Grant Avenue on the west and Park Boulevard on the north.

2. Respondent, City of Palo Alto ("City") is a municipal corporation and a charter city.

3. The City Council of City ("Council") passed Ordinance No. 2224 on December 28, 1964, rezoning the subject property to a "Planned Community" ("PC") zoning district.

4. Ordinance No. 2224 became effective on January 28, 1965.

5. Ordinance No. 2224 contains a Development Plan and Development Schedule providing for two phases of construction. Phase 1 provided for start of construction of a four-story office building and a parking garage within two years of Council approval. Phase 2 provided for a start of construction of six additional floors of the four-story office building and additional levels on the parking garage by October 31, 1976.

6. In August, 1965, City was informed that a part of the subject property planned by Petitioner for the permanent parking structure approved by Ordinance No. 2224 might be required by the County of Santa Clara ("County") for a County road project (Page Mill-Birch Street realignment). From 1961 on, the County wanted to undertake this project to improve traffic safety on the County Expressway System, of which the

Birch Street off-ramp (adjacent to the parking structure site) was a part. The County initiated, designed and constructed improvements for that project, including the Birch Street off-ramp, and condemned the land for the same. The County retained control of the project and there is no evidence that the City had any control over the project.County did not actually determine its condemnation take from the parking structure site until 1969. Accordingly, in an attempt to alleviate the problem caused by this uncertainty so as to allow Petitioner to proceed on a temporary basis, the Council passed Resolution No. 3860 on December 13, 1965, amending the Development Plan and Development Schedule of the PC zone established by Ordinance No. 2224. Resolution No. 3860 approved construction of Phase 1 with 107 temporary offstreet parking spaces in lieu of the required permanent parking structure and gave Petitioner an extension of time until December 13, 1968, to start construction of the parking structure.

7. City Zoning Ordinance §18.68.070(a) allows PC zoning districts to be amended by resolution rather than ordinance.

8. In October, 1965, the County asked the City to make no allowance for improvement of approximately 11,500 square feet of the subject property at the intersection of Grant Avenue and Birch Street (the "Grant-Birch" parcel). The County made this request, since it intended to condemn that part of the subject property for expansion of the North Santa Clara County Courthouse and did not wish to pay for improvements thereto. Petitioner withdrew this parcel from its original project proposal prior to passage of Ordinance No. 2224, at the urging of a private merchants' group, thus facilitating the Courthouse expansion. There is no evidence that the City was responsible for the acqusition of the Grant-Birch parcel.

9. In 1966, the County commenced condemnation proceedings for acquisition of the Grant-Birch parcel. In the Spring of

1967, following a jury trial, the County acquired this parcel and Petitioner received just compensation for the taking.

10. On January 17, 1966, City issued a use permit for the Phase 1 four-story building, promptly following passage of Resolution No. 3860.

11. On June 14, 1966, City issued a building permit for construction of a four-story office building as approved by Ordinance No. 2224 and Resoultion No. 3860 (Exhibit 10).

12. Prior to June 14, 1966, Petitioner's architect, Albert A. Hoover, raised the question with Petitioner about the additional expense to be incurred in designing and building the four-story office building to accommodate a six-story addition when the possibility existed that only the first four stories would ever be constructed and, therefore, such additional expenses could not be recovered. Petitioner was willing to assume the risk of incurring such expense.

13. The four-story building authorized by the June 14, 1966, building permit (Exhibit 10) was completed in August, 1977. It was substantially leased by the Spring of 1968. It is a self-contained, functional structure even without the additional six floors, and has been occupied and used up to and including the present.

14. On December 11, 1967, Council plassed Resolution No. 4055, amending the Development Plan and Development Schedule of the PC zone established by Ordinance No. 2224 and giving Petitioner an extension of time until December 13, 1969, to start construction of the parking structure.

15. Before February 15, 1968, and within six months after completion of the four-story building, Petitioner instructed its architect to proceed forthwith in preparing a complete set of working drawings for the six-story addition for Phase 2. The drawings were completed by the Fall of 1968.

16. As to the design of both Phase 1 and 2, the practice of Petitioner's architect was to apply changes in local and state laws, such as the Uniform Building Code, occurring after commencement of work on each of such phases.

17. Before the Phase 2 drawings were completed, the Council passed Resolution No. 4113 on May 6, 1968 (Exhibit 14) to further assist in the solution of the parking problem and to allow Petitioner to obtain permanent financing for Phase 2. This resolution amended the Development Plan and Development Schedule of the PC zone established by Ordinance No. 2224. It rescinded Resolutions Nos. 3860 and 4055. It also continued the prior authorization of 107 surface parking spaces in lieu of the permanent parking structure and permitted use and occupancy of the four-story building with such surface parking. It provided further that "construction of the permanent parking structure shall start on or before October 31,1976"—the same date provided in Ordinance No. 2224 for start of construction of the six-story addition. Finally, Resolution No. 4113 provided that the six-story addition "shall remain unused and unoccupied until the parking structure is completed." Except as herein indicated, Resolution No. 4113 left all other sections of Ordinance No. 2224 as originally written. Resolution No. 4113 has never been amended.

18. By Fall, 1968, Petitioner had obligated itself to its architect to pay for the complete Phase 2 working drawings.

19. In August, 1969, after finally determining the engineering design requirements, County commenced condemnation proceedings to acquire approximately 4,000 square feet of the permanent parking structure site between Page Mill Road and Sheridan Avenue for the County's Page Mill/Birch Street realignment ("parking site acquisition"). Prior to this date, Petitioner was free to apply to City for a building permit to build the parking structure approved by Ordinance No. 2224 and

Resolution No. 4113, but decided not to do so for reasons of its own.

20. In the Fall of 1969, Petitioner ordered the structural steel and elevators for Phase 2 and submitted the Phase 2 plans for bid. On September 30, 1969, Petitioner's then managing general partner (W. G. Dunn) instructed its general contractor to "immediately commence placement of all subcontracts for the construction of the six-story building addition" (Exhibit R40), including at least structural steel, steel decking, exterior facade and elevators.

21. By its letter of September 30, 1969 (Exhibit R40), and by the acts of its general contractor pursuant thereto in placing contracts for structural steel (Exhibit R66) and elevators (Exhibit R44), Petitioner fully obligated itslef to pay for Phase 2 development costs prior to obtain financing to construct Phase 2 and prior to being issued a building permit for Phase 2 on February 16, 1970 (almost five months later).

22. Petitioner admits that it committed a mistake by not obtaining financing before committing the partnership to the obligation involved in paying for the steel and elevators for Phase 2, and that this mistake got the partnership into financial difficulties. This mistake was in no way attributable to Respondent or any of its officials or employees.

23. Petitioner's inability to obtain Phase 2 financing was not due to any act or acts of Respondents. Despite continuing efforts throughout 1968 and 1969, Petitioner was unable to obtain anything other than a verbal agreement from a lender in late 1969 which ultimately failed to materialize because the lender found itself overcommitted during that same period of time. Similarly, in the Fall of 1976, Petitioner was unsuccessful in its one effort to obtain Phase 2 financing because the lender's agent stated that time was too short to permit any substantive negotiations prior to the Phase 2 deadline of October 31, 1976, for start of construction.

24. On November 7, 1969, Petitioner executed a real estate purchase contract with Power Construction, Inc. ("Power") under which Petitioner acquired the right to purchase several parcels of land in the block south of and adjacent to the subject property. Petitioner considered the Power parcels as a possible alternative to provide the necessary offstreet parking for the six-story addition. Petitioner never requested a zone change to use the Power percels for such parking despite its awareness of the pending County condemnation for the parking site acquisition, and despite its further awareness of City requirements in this regard by virtue of its zone change application for an amendment to the PC Development Schedule ultimately passed by the Council in Resolution No. 4113 (Exhibit 117). Mr. Power testified that the City never interfered with his contractual relations with Petitioner. Because of Petitioner's inability to obtain Phase 2 financing, the Power parcels were permitted to revert to Power late in 1971, and a quit-claim was executed by Petitioner in 1973.

25. Late in 1969, a controversy between Petitioner and City arose over the installation of a smokeproof tower. Earlier in 1965, City had resolved a similar dispute in Petitioner's favor within three weeks of the date it was raised by permitting construction of Phase 1 with an interior smokeproof tower. The 1969 controversy lasted about two months and was resolved in Petitioner's favor on February 2, 1970, by issuance of a building permit for Phase 2 using a mechanically-ventilated interior smoketower (Exhibits 17 & 19). An inter-office communication from the city attorney's office to the city manager (Exhibit 18) does not show that the City recognized that Petitioner has a vested right to *construct* Phase 2 but instead only a vested right to a *method* of construction, namely an interior smokeshaft in the existing four-story building. The refernece to vested rights in Exhibit 18 does not apply to construction of Phase 2.

26. On March 30, 1970, City issued Petitioner a use permit following an appeal from the City zoning administrator's refusal to issue the use permit on the ground that the proposed six-story addition would create a building approximately 14 feet (or 11 percent) higher than the building approved by the PC zoning in Ordinance No. 2224 and that the proposed addition was a variation not within reasonable limits of the zoning administrator's administrative discretion to approve. The use permit was granted within approximately six weeks after Petitioner applied for it.

27. On March 11, 1970, during a hearing on its appeal from the use permit denial, Petitioner told the City Planning Commission ("Commission") that it would not be building a parking structure, that it had options on sufficient land to provide the required Phase 2 parking, and that it realized it would have to provide parking before it could use and occupy the six-story addition (Exhibit 20, p. 83).

28. On March 30, 1970, at the hearing at which the Council approved the Phase 2 use permit, City advised Petitioner that the PC Development Plan required construction of the parking structure before October, 1976 (Exhibit 21, p. 238).

29. On April 3, 1970, the City staff advised Petitioner in writing that it should file plans in the near future for "consideration of a change of the approved Development Plan which now requires an off-street parking structure" (Exhibit 128).

30. On April 13, 1970, the Council amplified the minutes of its March 30, 1970, meeting to reflect that, as to Phase 2, the "parking requirements are expected to be consistent with the previously approved plan" approved by Ordinance 2224 (Exhibit 22).

31. City granted Petitioner's request of May 22, 1970, to extend the Phase 2 building permit to July 1, 1970 (Exhibit R4).

32. The Phase 2 building permit (Exhibit 19) expired on July 1, 1970, because of Petitioner's inability to obtain financing.

33. City granted Petitioner's request to extend the Phase 2 use permit to March 30, 1972.

34. The Phase 2 use permit expired on March 30, 1972, because of Petitioner's inability to obtain financing.

35. No construction work was ever undertaken on either the Phase 2 six-story additon or the permanent parking structure.

36. In August, 1970, the County of Santa Clara completed condemnation proceedings to acquire approximately 4,000 square feet of the permanent parking structure site between Page Mill Road and Sheridan Avenue for the County's Page Mill/Birch Street realignment. The County acquisition was based on a Stipulation for Judgment executed between Petitioner and County (Exhibit R5). County commenced this condemnation proceeding in August, 1969, approximately one month before Petitioner ordered the steel and elevators for Phase 2 (Exhibit R40). Petitioner received just compensation for this taking, including certain excess lands deeded to it by the County contiguous to the parking structure site.

37. On October 6, 1972, at Petitioner's request, City staff members met with Petitioner for the purpose of discussion construction requirements and processing of Phase 2. There was no intent to delay, hinder or thwart Petitioner in any way on the part of the City staff members present at the October 6, 1972, meeting, or on the part of any other City official, at that time or at any other time.

38. Approximately one year after the Phase 2 use permit expired (February 27, 1973), Petitioner applied for a new use permit for the Phase 2 six-story addition, but withdrew the application on March 20, 1973, without it being acted upon by the City. Petitioner intended to resubmit its application a few

months thereafter, but did not do so because it lost its chief tenant which decided to move to a new facility to achieve its own corporate identity. There was no evidence that the tenant vacated because of Petitioner's inability to provide more space for it in the contemplated six-story addition.

39. On September 24, 1973, the City passed Ordinance No. 2475 (Exhibit R8) placing a 50-foot height limit on buildings in certain zoning districts but not Planned Community zones, such as applies to the subject property.

40. The City passed various ordinances adopting current editions of various construction codes which were applicable to Phase 2. Among these were Ordinance No. 2436, passed on May 27, 1968, adopting the 1967 editions of the Uniform Building, Electrical, Mechanical and Plumbing Codes (Exhibit R3), Ordinance No. 2605, passed on June 7, 1971, adopting the 1970 editions of the Uniform Building and Mechanical Codes (Exhibit R6), and Ordinance No. 2809, passed on August 26, 1974, adopting the 1973 editions of the Uniform Building, Mechanical and Housing Codes.

41. For a period of approximately three years, from the date of its withdrawal of its Phase 2 use permit application on March 20, 1973, Petitioner did nothing about further construction on Phase 2 until June 30, 1976, when it applied for a zone change with respect to the parking problem and also for new uses not previously permitted (Exhibit 225). Despite being told by the City's zoning administrator on March 31,1975, that the City might agree to a reduction of parking spaces, Petitioner waited for more than a year to submit its zone change application. Petitioner did not start working in earnest on the parking problem until October or November, 1975.

42. Petitioner's zone change application of June 30, 1976, was defective in that it included a portion of property not owned by Petitioner and also a portion of the City street on

Sheridan Avenue. No City staff member told Petitioner that such an application would be approved either prior to or after its submittal.

43. Pursuant to §18.68.070(a) of the City Zoning Ordinance governing PC District Regulations, zone changes in a PC district are considered the same as changes in the City zoning map and are in accordance with the general rezoning procedures set forth in City Zoning Ordinance Chapter 18.98. Section 18.98.020 limits zone change applications to the Council or Commission or "a property owner." Section 18.98.030 permits zone change applications to include non-owned property only if it includes the written consent of the owner of record of legal title to make such application.

44. Petitioner's June 30, 1976, zone change application did not include the written consent of the owner of record of legal title to either the privately-owned property (Mrs. Pierson) or the City property in Sheridan Avenue.

45. Petitioner's June 30 zone change application did not request a hearing date before the Commission until August 25, 1976.

46. Almost nine years elapsed from the date Petitioner completed the four-story building on August 17, 1967, to August 11, 1976, when it submitted a request for a three-year extension of the Phase 2 deadline of October 31, 1976, contained in the PC Development Schedule in Ordinance No. 2224 and Resolution No. 4113.

47. On August 25, 1976, the Commission adopted a motion recommending to the Council that the three-year request be denied. This procedure followed the provisions of PC District Regulations set forth in Zoning Ordinance §18.68.080D. Following the Commission's recommendation of denial, Petitioner withdrew its three-year request and, instead, filed an application for a use permit for Phase 2 on August 30, 1976.

48. On August 31, 1976, Petitioner submitted an application for a building permit for the six-story addition based upon the building plans for which a permit had been issued in 1970. These plans had not been revised to meet current code requirements. The City, subsequent to the expiration of the 1970 building permit for the six-story addition, had adopted the 1970 and 1973 editions of the Uniform Building Code and other construction codes. The August 31, 1976, application for a building permit for Phase 2 did not comply with those codes.

49. The City building inspector refused to issue a building permit for the six-story addition on three grounds: (1) the plans submitted did not conform to then existing codes; (2) no use permit had been issued for the six-story addition as required by §18.68.040 of the PC District Regulations and (3) Petitioner's zone change application of June 30, 1976 (for parking and new uses) and August 11, 1976) for time extension) were then pending.

50. On September 8 and September 21, 1976, respectively, at Petitioner's request, City staff members met with Petitioner and its architect to discuss Phase 2. On September 8, 1976, City staff members advised Petitioner to resubmit revised building plans to conform to current codes. No revised plans were submitted until October 15, 1976, 16 days before the October 31, 1976, deadline for start of construction.

City staff members further advised Petitioner that City would submit the revised plans to the International Conference of Building Officials (ICBO) in Whittier, California, for plan check because (1) there were numerous building code changes that required extensive review, (2) the revisions were complex, and (3) under then existing time constraints the City building inspector could not undertake the review and approval.

51. On October 1, 1976, Petitioner filed a request with the Commission to amend the Development Schedule by requesting

a one-year extension for start of construction of the six-story addition.

52. On October 20, 1976, Petitioner submitted an extensive letter to the Commission in support of its one-year extension request.

53. On October 27, 1976, the Commission held a public hearing in which all relevant issues were discussed by Petitioner, its counsel, members of the public, the City staff and the Commission (Exhibit 48). At the conclusion of the hearing, the Commission passed a motion recommending to the Council that the one-year request be denied.

54. On October 28, 1976, the City building inspector denied Petitioner's request for an interim building permit on the grounds that no use permit had yet been issued for Phase 2 and that no plans for construction of a parking structure had been submitted.

55. On December 7, 1976, the Council held a public hearing on Petitioner's one-year request. The request for extension was submitted to lengthy debate in which all relevant issues were discussed and in which Petitioner and its counsel, members of the public, members of the City STaff and Council members fully participated. The Chairperson of the Planning Commission described the Commission's reasons for denying the extension. These were: the unresolved parking problem, the ten-year length of time for completing the development, the advantage over others in granting an extension, the changed conditions of the area and height limitations that could be considered. Council members discussed and considered such subjects as the impact of the County condemnation action on the parking requirements, the economics of the project, building height limits, environmental impact reports, delays in completing the project, the interests of the community, the general changes in the city's comprehensive plan. The pros and cons from public

participants discussed added jobs and taxes to be derived from the building's construction on the one hand to the need for an environmental report and general opposition to the building and its proposed height on the other.

56. The Council thoroughly considered Petitioner's request at its meeting. The discussions and deliberations were complete and unhurried. The factual data the Council had before it fairly represented both sides of the issues. Petitioner was asked on two separate occasions if it had been dealt with in good faith by City. Both times the answer was affirmative.

57. On December 7, 1976, the Council following the hearing and its deliberations, denied Petitioner's request for a one-year extension. Pursuant to PC District Regulations §18.68.070(a) and 18.68.080, the Development Schedule is part of the Development Plan which, in itself, is the PC zoning. Any request to change to the Development Schedule is a request for a rezoning or an amendment to the PC zoning as established by Ordinance No. 2224.

58. At the time the Council denied Petitioner's one-year request, no building permit had been issued for construction of the six-story addition or the parking structure. The previously issued building permit expired on July 1, 1970, and the use permit on March 30, 1972.

59. There was never any act or intent on the part of any of Respondents to obstruct, hinder or delay Petitioner.

60. There was no deliberate or willful attempt to delay, hinder or obstruct Petitioner in the completion of either Phase 1 or Phase 2.

61. Petitioner did not commence construction on Phase2by virtue of expending money to overbuild Phase 1 to accommodate it.

62. Respondents have acted conscientiously and in good

faith with Petitioner at all times.

63. None of Respondents' actions have been unreasonable, unlawful, arbitrary or discriminatory.

CONCLUSIONS OF LAW

From the foregoing findings of act, the Court makes the following conclusions of law:

1. Ordinance No. 2224 was a proper legilsative exercise of the police power through zoning. Zoning is not a contract.

2. Ordinance No. 2224 established a specially enacted zoning for the subject property which, from its effective date, prescribed a fixed, limited time period for start of construction for both Phase 1 and Phase 2.

3. There is nothing in Ordinance No. 2224, or law in general, which provided that the completion of Phase 1 guaranteed or vested any right to complete Phase 2.

4. The appropriate and applicable form of mandamus in this action is under California Code of Civil Procedure §1085. The City's actions in passing Ordinance No. 2224, Resolutions 3860 and 4055, and in considering Petitioner's requests for time extensions were legislative functions, not administrative orders or decisions which latter functions are reviewable under Code of Civil Procedure §1094.5.

5. The City Council in considering and deciding upon the request in this case to extend the ordinance was not acting in a quasi-judicial capacity but was performing a legislative function subject only to traditional mandamus review.

6. The decision regarding staff issuance of use permits under the City's PC zoning regulations is both ministerial in character and supplements the PC legislative process reviewable under Code of Civil Procedure §1085.

7. The decision whether or not to issue a building permit

involves a ministerial act reviewable under Code of Civil Procedure §1085.

8. The scope of review by the trial court in traditional mandamus actions (section 1085) requires only an examination into whether the action taken was arbitrary, capricious or entirely lacking in evidentiary support.

9. A city council in amending a zoning ordinance is not required to make express findings of fact as to the public purpose of the ordinance or its relation to the police power. Council members are not required to articulate for the record all of the reasons and motives behind their decisions.

10. No fundamental vested right was ever acquired by Petitioner. Absent such a right, the test of the City Council's action was whether there was substantial evidence to support it.

11. The action taken by the Council in denying the one-year request was supported by more than substantial evidence.

12. Petitioner did not acquire vested rights to construct Phase 2 by virtue of overbuilding Phase 1 to accommodate it or in any other respect.

13. Petitioner had not at any time acquired vested rights to a building permit to construct Phase 2; therefore, the Council's denial of the one-year extension did not constitute a deprivation of vested rights.

14. There is no basis for application of the doctrine of estoppel against Respondents.

15. None of Respondents' actions have been unreasonable, unlawful, arbitrary, discriminatory, malicious nor void, nor have such resulted in any denial of due process or equal protection of the laws.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: July 6, 1978.

JUDGE JOHN R. KENNEDY

Judge of the Superior Court

Appendix B

Original
FILED
June 4 1982
William Whittaker
Clerk, U.S. District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

COURT HOUSE PLAZA COMPANY, a limited partnership,	)	
	)	No. C-81-4537 SC
Plaintiff,	)	
-vs-	)	
	)	ORDER GRANT-
THE CITY OF PALO ALTO, a municipal corporation, et al.,	)	ING MOTION TO DISMISS
	)	
Defendants.	)	

ORDER GRANTING MOTION TO DISMISS

Plaintiff, a building developer, seeks damages and equitable relief for the actions of the Palo Alto City Council and its Planning Commission in denying building and use permits for the second phase in the construction of a ten-story office building and in denying a one-year extension of the building's development schedule provided by a municipal zoning ordinance. Because plaintiff's action is precluded by the *res judicata* effect of a prior judgment in state court, plaintiff's action must be dismissed.

After the city council's denial of plaintiff's application for the necessary permits and extension of time, plaintiff sought a writ of mandamus from the California Superior Court. Plaintiff was denied relief in superior court and on appeal. *See Court House Plaza Co. v. City of Palo Alto*, 17 Cal. App. 871, 173 Cal. Rptr. 161 (1981). Plaintiff now seeks relief on six causes

of action: federal and state constitution "taking" claims (inverse condemnation); federal and state constitution equal protection and due process claims; a federal civil rights claim; and a declaratory judgment claim. The latter two claims rest on the constitutional violations alleged in the first four, and contain no independent factual allegations.

The doctrine of *res judicata* prevents a plaintiff from relitigating claims adjudicated in another prior proceeding. The Ninth Circuit has extended *res judicata* to ban federal constitutional claims, whether or not asserted in state court,

> where the federal constitutional claim is based on the same asserted wrong as was the subject of [the] state action, and where the parties are the same.

Scoggin v. Schrunk, 522 F. 2d 436, 437 (9th Cir. 1975).

The federal claims here are based on the same alleged wrongful acts which formed the basis of plaintiff's state court mandamus action. Also, plaintiff has sued all the same defendants with the exception of one individual named in the state court proceeding. Consistent with *Scoggin*, plaintiff's claims for declaratory relief, for relief under the civil rights act, and for the alleged federal constitutional violations on which those claims are barred by *res judicata*.

Plaintiff's citation of *Gallagher v. Frye*, 631 F. 2d 127 (9th Cir. 1980) is inapposite. The court in *Gallagher* distinguished *Scoggin* on the facts. In *Scoggin*, plaintiff sought to set aside a foreclosure sale in federal court, after being unable to successfully challenge it in state court. In *Gallagher*, however, plaintiff's initial state court mandamus proceeding attempted to enforce an administrative order of a civil service board against a museum. Plaintiff's federal claim addressed defendant's underlying act of employment termination. The essential issue in the state court proceeding was "the jurisdictional authority of of the state administrative agency." *Id.* at 129-30. The issue in the federal court proceeding was whether the alleged wrongful conduct of the defendant museum violated plaintiff's civil rights.

In the instant case, the alleged violations of the federal constitution have been adjudicated in state court. The state court of appeal upheld the trial court's findings that the denial of the time extension did not deprive plaintiff of equal protection or due process of law, *Court House Plaza v. City of Palo Alto*, 117 Cal. App. 3d at 883, and that the city's adverse zoning action did not constitute a "taking" requiring compensation. *Id.* at 888. Furthermore, even assuming that these constitutional claims had not been raised, having had the ability to raise the federal claims in the state court proceedings bars this court from adjudicating them now. *Scoggin v. Schrunk*, 522 F. 2d at 437.

Finally, when a district court, as in this case, dismisses all federal claims prior to trial, "the proper exercise of discretion requires dismissal" of the state claims. *Wren v. Sletten Construction Co.*, 654 F. 2d 529, 536 (9th Cir. 1981). Such claims should be dismissed for want of federal jurisdiction. *Hodge v. Mountain States Tel. & Tel. Co.*, 555 F. 2d 254, 261 (9th Cir. 1977).

In accordance with the foregoing, it is hereby ordered that defendants' motion to dismiss plaintiff's complaint is granted.

Dated: June 4, 1982

SAMUEL CONTI
United States District Judge

Appendix C

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COURT HOUSE PLAZA COMPANY, a limited partnership,	)	
Plaintiff-Appellant,	)	
v.	)	No. 82-4393
THE CITY OF PALO ALTO, a municipal corporation, STANLEY R. NORTON, BYRON D. SHER, FRED S. EYERLY, ROY L. CLAY, KIRKE W. COMSTOCK, SCOTT T. CAREY, JOHN J. BERWALD, ANNE R. WITHERSPOON, JOHN V. BEARS, Councilmen, PETER R. CARPENTER, MARY R. GORDON, WILLIAM E. GREEN, JAY W. MITCHELL, EMILY M. RENZEL ANNE STEINBERG, Planning Commissioners, STAN J. NOWICKI, Chief Building Inspector, JAMES O. GLANVILLE, Zoning Administrator, NAPTHALI H. KNOX, Director of Planning and Community Environment, ROBERT K. BOOTH, JR., City Attorney and LOUIS B. GREEN, Assistant City Attorney,	)	DC #CV-81-4537-SC MEMORANDUM

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
Samuel Conti, District Judge, Presiding
Argued and submitted April 14, 1983

Before: KILKENNY, SCHROEDER, and BOOCHEVER, Circuit Judges.

The district court's dismissal, on res judicata grounds, of this federal civil rights action must be affirmed under *Scoggin v. Schrunk*, 522 F.2d 436 (9th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1979).

Affirmed.

Appendix D

Ropers, Majeski, Kohn, Bentley, Wagner & Kane
A Professional Corporation
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Attorneys for defendants The City of Palo Alto and each individually named defendant

In the Superior Court of the State of California
in and for the County of Santa Clara

Civil No. P33070

Court House Plaza Company, a limited partnership,
Plaintiff,

vs.

The City of Palo Alto, a municipal corporation, Stanley L. Norton, Byron D. Sher, Fred S. Eyerly, Roy L. Clay, Kirke W. Comstock, Scott T. Carey, John J. Berwald, Anne R. Witherspoon, John V. Bears, Councilmen, Peter R. Carpenter, Mary R. Gordon, William E. Green, Jay W. Mitchell, Emily M. Renzel, Anne Steinberg, Planning Commissioners, Stan J. Nowicki, Chief Building Inspector, James O. Glanville, Zoning Administrator, Napthali H. Knox, Director of Planning and Community Environment, Robert K. Booth, Jr., City Attorney and Louis G. Green, Assistant City Attorney,
Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRERS AND MOTION TO STRIKE

Date: Monday, April 26, 1982
Time: 9:30 a.m.
Dept: One
Est. Length of Hearing: 30 Mins.

MEMORANDUM OF POINTS AND AUTHORITIES

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XIII. SINCE AN ACTUAL CONTROVERSY NO LONGER EXISTS, PLAINTIFF IS NOT ENTITLED TO DECLARATORY RELIEF 21

XIV. CONCLUSION 21

EXHIBITS

A. Claim against City of Palo Alto, March 3, 1977.

B. Complaint for Damages, filed September 22, 1977, Action Number P33070.

C. Petition for Writ of Mandamus, filed May 23, 1977, Action Number P32449.

D. Memo of Decision, Action Number P32449.

E. Findings of Fact and Conclusions of Law, Action Number P32449.

F. Judgment Denying Peremptory Writ of Mandate, Action Number P32449.

G. *Court House Plaza vs. City of Palo Alto* (1981) 117 C.A.3d 871.

H. Denial of Petition for Rehearing in Court of Appeals.

I. Denial of Hearing by California Supreme Court.

J. Notice of Appeal to U.S. Supreme Court.

K. Dismissal of Appeal and Denial of Certiorari by United States Supreme Court.

No. 85-287 (3)

Supreme Court, U.S.
FILED
OCT 24 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

COURT HOUSE PLAZA COMPANY,

Petitioner,

v.

CITY OF PALO ALTO, ET AL.,

Respondents

On Petition From The Court of Appeal
Of The State of California, Sixth Appellate District

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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October 1985

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Wright, Miller, Cooper & Gressman,
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INTRODUCTION

Respondents City of Palo Alto, et al. ("City") oppose the petition on the single ground that the decision below was rendered under California law of *res judicata*, an "independent state ground." Consequently, City reasons, no federal question whatsoever is presented to this Court.

City offers too narrow a view of this case. City has not only mischaracterized the record upon which the Court below found *res judicata*, but also obscured the federal questions that lie at the core of that record.

More significantly, City's reply brief does not cite at all this Court's most recent decision on the prerequisites for federal jurisdiction in a fifth-amendment "takings" case–namely, *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, __U.S.__, 105 S.Ct. 3180 (1985) (*"Hamilton Bank"*).

Consistent with the dictates of *Hamilton Bank*, petitioner Court House Plaza Company ("CHP") has fully exhausted all of available California remedies for taking of its property, including all judicial remedies available in California since 1977. In exhausting those remedies, CHP has necessarily obtained final judgments below.

The final judgment in *CHP I* produced the holding of *res judicata* in this case. Far from posing as an obstacle to review in this Court, the holding by the court below represents a seal of compliance with the requirements of *Hamilton Bank*.

Accordingly, the federal questions presented by the petition for certiorari may be addressed by this Court, notwithstanding that the court below relied upon California decisional law in determining that *res judicata* applied. For it is not the California doctrine of *res judicata* that is challenged here. Rather it is the taking of CHP's property and the constitutional deficiencies of California's remedies for that taking under the fifth and fourteenth amendments to the federal Constitution. California law on *res judicata* is implicated only to the extent that it has enabled the California courts to evade their constitutional responsibilities.

I. THIS COURT'S DECISION IN *HAMILTON BANK* REQUIRES PRIOR EXHAUSTION OF ALL AVAILABLE STATE REMEDIES, INCLUDING JUDICIAL REMEDIES.

In *Hamilton Bank* this Court held that the landowner's claims under the fifth and fourteenth amendments were premature and not ripe for adjudication, because the landowner had failed to exhaust certain administrative and judicial remedies still available in the county and the state, respectively. Because here the City has finally denied CHP an extension of the development schedule and because CHP lacks any further administrative remedies with the City, a fact never disputed by the City, CHP will address only the question of judicial remedies.

The landowner in *Hamilton Bank* had failed to bring an inverse condemnation action under Tennessee law in an effort to obtain just compensation for the alleged taking of property. In light of that failure, this Court ruled that the taking claim was "not yet ripe" because the state's action in denying just compensation was not yet complete. __U.S.__, 105 S.Ct. 3108, 3120. The court reasoned; ". . . if a state provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation clause until it has used the procedure and been denied just compensation." *Id.* This is true, this Court explained, "because the constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, . . ." *Id.*

CHP has exhausted the judicial remedies available in California. CHP was denied equitable relief in *CHP I*, a suit for mandamus. The inverse-condemnation remedy was not within the scope of the relief requested in *CHP I* and so was not fully adjudicated in CHP I. In fact, after 1976 the California courts effectively restricted the landowner to pursuing equitable remedies, and by 1979 the California Supreme Court in *Agins v. City of Tiburon*, 24 Cal.3d 266 (1979), eliminated the inverse condemnation remedy altogether.

Because the discussion of inverse-condemnation in *CHP I* was *dictum* only, the disposition of the petition for certiorari there has no importance for the present petition. 454 U.S. 1074 (1981) (U.S. docket no. 81-404).

As City reiterates tediously, *CHP I* led to adverse judgments based upon *res judicata* in both *CHP II* and *CHP III*. But the inquiry by this Court should not end there.

The chief thrust of the petition is that this case is now ripe for adjudication by this Court by virtue of petitioner's having exhausted all state remedies and by virtue of the failure of California courts to offer any "reasonable, certain and adequate provision for obtaining compensation" for the taking of CHP's property. *Hamilton Bank*, ___U.S.___ 105 S.Ct. 3108, 3121.

Had CHP not pursued the course of litigation in the California courts which City describes at length, those federal questions would be presented to this Court prematurely. They are not.

II. THE DECISION BELOW WAS NOT BASED UPON ANY INDEPENDENT GROUND OF SUBSTANTIVE STATE LAW.

A. *The Independent State Ground Doctrine Does Not Apply Here.*

Relying upon *Murdock v. Memphis*, 20 Wall (87 U.S.) 429 (1875), City argues that this Court may not review the decision below because the latter was based upon an "independent state ground." But *Murdock* does not prevent review here.

First, in *Murdock* the decision below by the Supreme Court of Tennessee was based upon the substantive law of that State; specifically, the law on real-property conveyances, trusts, and interpretation of instruments. 87 U.S. 429, 444. That kind of independent state ground is far different from the doctrine of *res judicata*. The latter possesses procedural aspects that distinguish it from other substantive rules of law. *See, generally, Restatement (Second) of Judgments* (1980), ch.1, at p.6 ("Decisions in the modern law of res judicata have been, or at least should have been, necessarily shaped by the statutory

provisions of the system of civil procedure. This relationship was not always fully appreciated.").

Obviously CHP is not challenging California law on *res judicata*; that is, the "primary right" doctrine relied upon by the court below. But CHP is challenging the application of that doctrine by the court below in a manner that violates CHP's rights under the federal constitution.

B. *A Paramount Federal Interest Renders the Independent State Ground Doctrine Inapplicable.*

Murdock v. Memphis does not prevent this Court from reaching those federal questions. In the past this Court has not regarded *Murdock* as a barrier to review where "the only relevant substantive law is federal." *Fay v. Noia*, 372 U.S. 391, 431 (1963).

In *Fay*, this Court refused to apply the adequate state-ground rule to a petitioner who failed to exhaust his state remedy of appeal before seeking *habeas corpus*. In doing so, this Court limited *Murdock* in at least two important respects: First, where "the only relevant substantive law is federal," then federal jurisdiction may still exist for this reason: "State law appears only in the procedural framework for adjudicating the substantive federal question. The paramount interest is federal." *Id.*

Second, *Murdock* and the independent state ground rule will not apply where, as a practical matter, strict application would make impossible the vindication of federal rights: "While it (the Court) has deferred to state substantive grounds so long as they are not patently evasive of or discriminatory against federal rights, it has sometimes refused to defer to state procedural grounds only because they make burdensome the vindication of federal rights" (footnote omitted). 372 U.S. 391, 432. *See, also, American Railway Express Co. v. Levee*, 263 U.S. 19, 21 (1923) ("The law of the United States cannot be evaded by the forms of local practice.")

The reasoning of *Fay v. Noia* applies to this case. Surely the "paramount" interest in this case is petitioner's federal right to compensation under the fifth amendment and the constitutional inadequacy of judicial remedies provided by the California

courts. The principle of comity therefore does not require giving effect to the *res judicata* holding by the California Court of Appeal.

Indeed, whether to apply the independent state ground doctrine in this case presents, in itself, a federal question to this Court. Because there is no legitimate state interest served by California's enforcing *res judicata* to preclude an inverse-condemnation claim, this Court may consider the question of reaching the federal constitutional issues notwithstanding the state ground of *res judicata*. *Henry v. State of Mississippi*, 379 U.S. 443, 447-8 (1965); *see, also*, Wright, Miller, Cooper & Gressman, Federal Practice and Procedure: Jurisdiction Sections 4021, 4024, 4026, 4029 (1977).

C. *This Case Presents A Recognized Exception to the Doctrine of Res Judicata.*

The California Court of Appeal acknowledged in its opinion that CHP's cause of action for inverse condemnation would have had "questionable validity" if raised in *CHP I*. Petition for Certiorari, Appendix B-4. The phrase "questionable validity" is a judicious euphemism. 'Worthless' might have been more accurate and plain.

Thus it is misleading for City to argue that the discussion of California remedies by the Court of Appeal is "merely a historical preface" to a precise holding on *res judicata*. City's Brief in Opposition, p.8. In truth, the history is not preface but essence. What the Court of Appeal said about inverse-condemnation remedies in California is a testimonial to the federal issues presented here.

The doctrine of *res judicata* itself admits the exception for which CHP argues here. For example, section 28 of Restatement (Second) of Judgments, *supra*, summarizes several exceptions to the general rule of issue preclusion.

One such exception is based upon a change in applicable legal rules or upon the broad principle of avoiding unfairness. There is no preclusion if:

> The issue is one of law and (a) the two actions involve claims that are substantially unrelated or (b) a new deter-

> mination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the law; . . .

Restatement (Second) of Judgments sec. 28(2) (1980). Yet another exception addresses the difference in "the quality or extensiveness of the procedures followed in the two Courts . . ." *Id.* sec. 28(3). Here CHP argues that the mandamus proceeding in *CHP I* entailed only a restricted scope of review and no direct inquiry into fifth amendment rights.

One could say that these exceptions flow from considerations of fairness—equity, in short. If so, then CHP commends those considerations to this Court. But City chides CHP for reciting the inequity CHP has suffered. City's Brief in Opposition, pp. 13-4.

CHP is not ashamed to declare that the experienced meaning of constitutional wrong is personal misfortune. It has always been thus. It is so here.

As the petition for certiorari states, CHP acquired vested rights in Phase 2 of its project; yet the California courts have refused to recognize those rights or to hear on the merits CHP's claim for damages. This is the wrong requiring redress in this Court.

CONCLUSION

This Court is well aware that the question of inverse-condemnation remedies has concerned other litigants in land-use cases arising in California since 1979 at least. The present case affords this Court another opportunity to answer that question. For this and all the above reasons, the petition should be granted.

POSTSCRIPT

On October 22, 1985, just before service of this Reply Brief, CHP learned that this Court had accepted review in *MacDonald, Sommer & Frates, Appellant v. The County of Yolo and The City of Davis, Appellees*, U.S. Docket No. 84-2015. The Jurisdictional Statement in that appeal presented two federal questions similar, in essence, to two of the questions presented. The questions in *MacDonald* are:

> 2. When zoning regulations are found to effect a taking, whether the Fifth Amendment mandates that the property owner receive just compensation for the time during which his property interest was subject to the regulations, or whether he can only obtain injunctive relief against future application of the regulations.
>
> 3. Whether a state, by limiting an aggrieved property owner's remedy to a mandamus action, deprives the property owner of an adequate state remedy, thereby denying the property owner of due process and rights protected pursuant to 42 U.S.C. § 1983.

Jurisdictional Statement, No. 84-2015, at p.ii. Here the first question presented by CHP subsumes both of the above (excepting the reference to an action under 42 U.S.C. § 1983):

> 1. Should this Court now resolve the division among the state courts and federal courts as to whether the Fifth Amendment to the United States Constitution requires a monetary remedy for inverse condemnation through excessive land-use regulation?

CHP's second question addresses the continued viability of *Agins v. City of Tiburon*, 24 Cal.3d 266 (1979)—the decision relied upon also by the Third District Court of Appeal of California in *MacDonald*. Jurisdictional Statement, Appendix A.

Accordingly, CHP submits that this Court should grant the petition for certiorari for the same reasons the Court accepted

review in *MacDonald*. Alternatively, CHP suggests that deposition of the petition be deferred until after the Court decides the appeal in *MacDonald*. The federal questions are, in the final analysis, common to both.

Respectfully submitted,

FLEHR, HOHBACH, TEST,
ALBRITTON & HERBERT

By /s/ Harold C. Hohbach
Harold C. Hohbach*

Counsel for Petitioner
*Counsel of Record

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF SANTA CLARA)

Harold C. Hohbach, being first duly sworn upon his oath, deposes and says that he is a member of the Bar of this Court and one of the counsel of record for Petitioner in this cause; that on this 23rd day of October, 1935, he mailed three copies of Reply Brief In Support Of Petition For Writ Of Certiorari in the cause by depositing same in the United States mail, first-class postage prepaid to:

Diane M. Lee	Fred Caploe
City Attorney	Williams & Caploe
250 Hamilton Avenue	P.O. Box 698
Palo Alto, CA 94301	Benicia, CA 94510

and that he also mailed forty copies of Reply Brief In Support Of Petition For Writ Of Certiorari to the Clerk of this Court, first-class postage prepaid, all in compliance with Supreme Court Rule 28.

/s/ Harold C. Hohbach
HAROLD C. HOHBACH

SUBSCRIBED AND SWORN to before me this 23rd day of October, 1985.

Witness my hand and official seal.

Lorraine G. Miller
Notary Public

My commission expires:
June 10, 1987